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Partidas

THE LAWS
OF
LAS SIETE PARTIDAS,
WHICH ARE STILL IN FORCE IN THE STATE
OF LOUISIANA.

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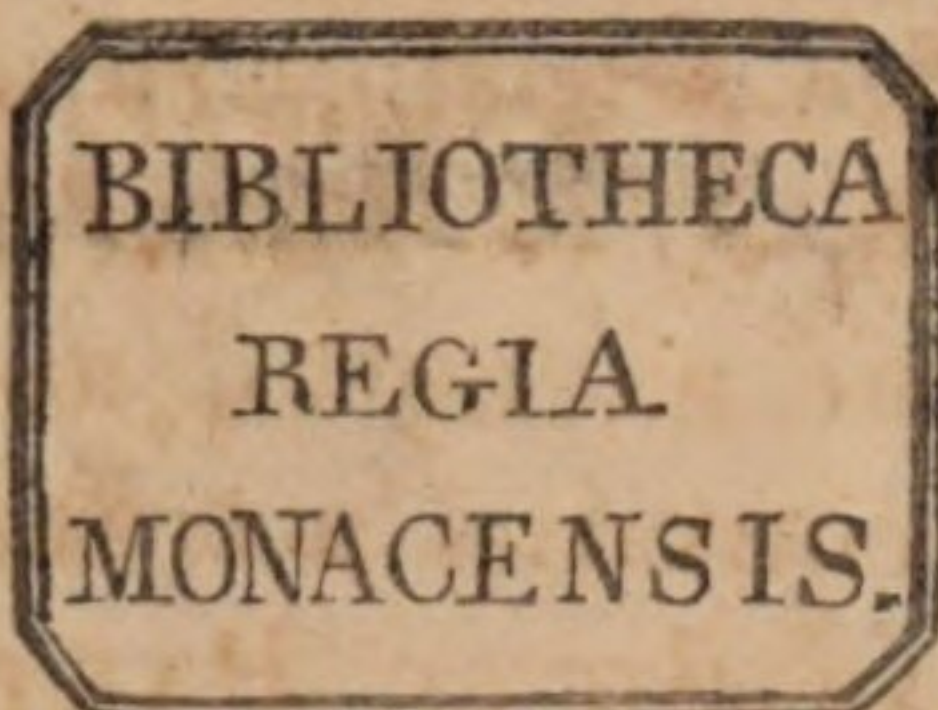
TRANSLATED FROM THE SPANISH BY
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COUNSELLORS AT LAW.

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BIBLIOTHECA

REGIA

MONACENSIS.

TRANSLATORS' PREFACE.

THIS work has been undertaken under the patronage of the legislature of Louisiana, which passed a law on the 3d of March, 1819, authorising it to be executed at the expense of the state. It contains a translation of all that portion of LAS SIETE PARTIDAS, which is considered as having the force of law in Louisiana. Those parts which relate to the Catholic faith, and to matters of a criminal nature having been repealed, are therefore entirely omitted.

The translators have compiled the following short historic sketch of Spanish legislation, hoping that it may afford some gratification to those who have not an opportunity of consulting the authors from which it is taken.

The laws of Spain are contained in various codes, the most complete of which is that known under the name of LAS SIETE PARTIDAS. The other codes are the FUERO JUZGO, FUERO VIEJO and FUERO REAL; to which may be added the laws regulating the practice of courts, the Royal Ordinances, and those of Alcala; the laws of Toro, the RECOPILACION DE CASTILLA, and the RECOPILACION DE LAS INDIAS. We will notice these codes in the order in which they were made and published, and the degree of authority ascribed to them in Spain, and the countries under her dominions.

Spain and Portugal, before they submitted to the power of the Romans, were governed by no other laws, than their customs and usages, traces of which are still to be found in the codes subsequently enacted by the kings of Spain. But after these countries were rendered tributary to the Roman empire by Augustus Cæsar, they were governed by the civil law alone, until the Romans themselves were expelled by the Goths, about the year 466 of the Christian æra. These barbarians, more devoted to arms than to science, suffered several years to elapse before they substituted a system of their own laws to those of the Romans.

Several Spanish authors who have treated this subject, and among others Don Juan Sala (1) pretend that the Goths for some time after their conquest, permitted the Spaniards to preserve the civil law, to which they had been accustomed, and which was then contained in the Theodosian Code, or in an abridgement, (*el Breviario*), made from it, from the Gregorian and Hermogenian codes, and from the decrees and institutes of Paul and Caius, by the Gothic jurisconsult Anien, about the year 506, under the reign of king Alaric. (2)

All these authors, however, agree that Euric who died about the year 483, and the first king of that dynasty, established a small num-

(1) In the abridged history of Spanish laws, entitled *Ilustracion del Derecho de Espana*.

(2) The Pandects of Justinian had already disappeared in Italy, at the period of the incursions of the barbarians.

ber of laws, which were the first that could be called Spanish. But under his successors, and particularly Leogivilde, they multiplied so fast, that Resevinde, desirous of effacing every vestige of Roman power, prohibited the use of the civil laws, by imposing a fine of thirty pounds upon every person who should cite them in court, and the judge who should found his judgments upon their authority. This barbarous severity was afterwards pushed so far as to inflict the punishment of death for that offence. (1)

Yet literature began early to make progress among the clergy, and the intimate union that prevailed at that time between them and the government, soon produced divers rules and regulations in the national councils, upon subjects both of a spiritual and temporal nature: these together with others, enacted by the Gothic kings, formed the *Fuero Juzgo* which was published about the year 693.

This code, the first made by the Spanish nation, is divided into twelve books, and each book into different titles. It was first published in Latin under the title of *Forum Judicum*, and was not translated into Spanish until the reign of Ferdinand III. in the thirteenth century. It was originally called the Book of the Judges, (*El Fuero de los Juécés*) which name has been changed by a corruption of words, into *Fuéro Juzgo*, the title under which it was printed in Madrid in the year 1600.

(1) Auto 1. tit. 1. lib. 2 of the *Autos Accordados*, make mention of this law.

But about the year 714, soon after the publication of this code, its authority was almost entirely overthrown by the invasion of the Moors, who conquered with incredible rapidity, the whole of Spain, except the Asturias, whither the Spaniards who had escaped their fury, fled under Don Pelage, a descendant of the Gothic kings. These invaders were not driven from the kingdom, until about the year 1492, when Grenada, their last refuge, was taken after eight centuries of almost continual warfare.

During this bloody struggle, the kings of Spain, having frequent need of the nobles and grandees who followed them in the field, were under the necessity of granting them many important privileges, and of establishing a code in their favour. Hence the origin of *El Fuero de los hijos dalgos*, the code of the nobles. So likewise, in order to encourage those who fought the enemy under their banners, or to people the conquered countries, they granted to various towns and surrounding territories, the enjoyment of certain particular customs, and usages, from which great confusion often arose in the construction and application of the laws. In order to remedy this evil and establish a uniform mode of judicial procedure in civil matters, *El Fuero Viejo*, the ancient code was published in the year 992. This code is divided into five books, containing the ancient customs and usages of the Spanish nation, and rules and regulations concerning the administration of justice. But its promulgation, far from affording a remedy to the evil it was intended

to cure, served only to increase the confusion which distracted all the tribunals of the kingdom ; some of them taking for the rules of their decision, the laws of the *Fuero Juzgo*, and others those of the *Fuero Viejo*, and others again deciding according to the ancient customs.

In this state of things, the disorder rose to such a height, that Ferdinand the III. was under the necessity of directing that the *Fuero Juzgo* should prevail in the kingdom of Castille ; while the *Fuero Viejo* should remain in force in the kingdom of Leon. Such was the distracted state of the laws of Spain, when Alphonso the IX. generally called the wise, or the learned, wishing to establish a uniform system of jurisprudence in all his dominions, published a third code under the name of the *Fuero Real*, the Royal Law. (a) This code may be considered as the precursor of the laws of the *Partidas* which we have translated, and which that prince had already ordered to be compiled. The *Fuero Real* is divided into four books, each of which contains several titles.

The *Partidas*, of which we will now speak, is the most perfect system of Spanish laws, and may be advantageously compared with any code published in the most enlightened ages of the world. These laws, the unceasing subject of the praise and admiration of every jurist acquainted with them, were compiled in

(a) The *Fuero Real* is, to the *Partidas*, what the institutes are to the Digest of Justinian.

imitation of the Roman Pandects, and may be considered as the digest of the laws of Spain, containing in addition to the canonical ordinances, all the civil laws in force in that kingdom at the time of their promulgation. Ferdinand the III. had projected that great work, in order to prevent confusion and diversity in the jurisprudence of the empire, by establishing uniform rules of legal decision. But the sudden death of that monarch prevented the execution of a project which was afterwards accomplished by the wisdom of Alphonso, his son and successor. Alphonso nominated four Spanish jurisconsults to whom he committed the execution of the intended work.—These enlightened men, whose names have not come down to us, entered upon this arduous task in the year 1256, and actually accomplished it, in the space of seven years. They borrowed from the canonical laws of Spain, all those parts of the new code which relate to matters of a religious nature. Those which relate to civil and criminal matters, were taken from those usages and customs which the lawgiver thought fit to preserve, but principally from the Roman laws, which the compilers freely translated almost literally, although they carefully avoid confessing that fact. (a)

Owing to the perpetual wars and revolutions by which Spain was agitated, the laws of the Partidas were not promulgated until the year 1343, during a session of the Cortez held

[a] The compilers often speak of the ancient sages, *los Sabios Antiguos*, whose maxims they borrowed, and by referring to the Civil laws, it is evident that the sages alluded to, are the Roman jurists.

at Alcala de Henares, under the reign of Alphonso the XI. And even after their promulgation, the death of that prince prevented them from going into full operation until the year 1505, when Ferdinand and Joanna gave them their sanction, at the Cortez held that year in the city of Toro.

The laws of the *Partidas* are divided into seven parts, *Siete Partidas*: from this division, this code takes its name. Each part is divided into titles, and each title subdivided into laws. The first contains the canonical laws and liturgy of the Catholic church. The second is a summary of the ancient usages and customs of the Spanish nation, and of the rules of its government, and political administration. (a) The 3d, 5th and 6th *Partidas*, contain an abridgement of all the principles and maxims of the Roman laws, on the subject of actions, suits, judgments, contracts, successions, testaments, minority, and tutorship; together with decisions on points which had been considered as doubtful, by the commentators on the civil law. The 4th is a compendium of the laws relative to betrothings and marriages, and of those which treat of the social relations of man, as regards paternal power, legitimate and illegitimate filiation, freedom, slavery, and enfranchisement. The 7th treats of crimes, offences, and punishments, and concludes, as do the *Pandects*, by two titles, the one, on the signification of words, and the other on the rules of law.

[a] As these two first parts have no relation to our system of government, they have not been translated.

Since the promulgation of the Partidas, some of its provisions have been abrogated, or amended by subsequent laws, particularly by the laws of the Recopilacion of Castille, of which we shall presently speak. But these alterations have not, in any way, changed the great principles of natural law, contained in the Partidas. They relate to certain laws only of a positive nature, which nations establish, modify, and repeal, as their wants, interests, or situation may require. (a)

The Partidas may therefore be considered as containing the fundamental principles of the laws of Spain. And when we reflect that they were compiled amid the tumult of arms and almost perpetual wars waged by that kingdom against the Moors, and in an age when most of the states of Europe were without any regular systems of jurisprudence, our admiration of this code is raised to the highest pitch. Yet we should reflect that even at that time, the Spaniards were preparing themselves to act the wonderful part they sustained under the reign of Ferdinand and Isabella, and the still more brilliant one of Charles V; that the spirit of chivalry had already softened the asperity of early manners; that the Moors had introduced in Spain, the arts, and the love of letters, which they had brought over with them from Africa, and that the pandects of Justinian had, some time before, been found at Amalfi, and were every where studi-

[a] As we proceed with the translation of the laws of the Partidas, we shall point out the alterations they have undergone, from laws of a subsequent date.

ed, so as greatly to facilitate the execution of this work.

A learned writer (a) speaking of the *Partidas* observes, "we find in every page of that work the highest wisdom, and the most stern justice. It gave to the monarch under whose auspices it was executed, titles more just to the epithet of wise, bestowed upon him by his contemporaries, than his astronomical researches, and phisical knowledge, however surprising the one and the other may have been considered, in an age, when all studies were so much disregarded. It is in that precious code, that we must seek the early treasures of the Spanish language ; there we shall find the characteristic features of that idiom, at a time when it retained, yet a simplicity, and turn, and form of expression, which gave it more freedom and ease than it now possesses, though written in an age, when the language yet unpolished, preserved much of its primitive rudeness. We however perceive in the stile of the work, a grace, a facility, worthy the elevated sentiments that pervade it ; and in spite of some defects, we believe, that the Spanish language, such as it was, when the *Partidas* were compiled, had already arrived to a degree of perfection which the Italian writers did not attain till many years after." In the *Partidas* are contained these remarkable words: "despotism tears the tree up by the roots ; a wise monarch prunes its branches."

[a] Dictionaire Historique, edition of 1810, vol. 1, p. 237, verb. Alphonso.

We shall pass rapidly over the different laws and ordinances promulgated in Spain after the appearance of the *Partidas*, until the promulgation of the *Recopilacion* of Castille, as all those laws and ordinances are to be found in that work.

During the period which elapsed from the commencement of the *Partidas*, to their first publication in the Cortes of Alcala in the year 1348, the laws relative to the forms of legal proceedings (*del Estilo*) made their appearance in the year 1310. That work contains two hundred and fifty laws, not divided however, into books or titles. Most of them relate to suits civil and criminal; to those who are parties to them; to the proofs to be given, as well as to the formalities to be observed in conducting them. It is for that reason they are called the laws of judicial proceedings, because they relate to the usages and customs of courts, and to the manner of conducting causes in them.

Since the publication of the laws of the *Partidas*, at the Cortes held at Alcala, and particularly since the Cortes of Toro in 1505, several laws and rescripts were published, as circumstances required. When their numbers increased, they were, at several epochs collected in one or more volumes, in virtue of a royal ordinance which gave them a legislative sanction. It was then that the ordinance of Alcala, the laws of Toro, and the royal ordinance were published.

The ordinance of Alcala (*El ordinamiento de Alcala*) appeared in 1348, the very

year the Partidas were first published. This ordinance is divided into 32 titles, and each title is subdivided into laws, relating to the manner of proceeding in courts; regulating certain contracts and wills; and providing for the suppression of crimes, and their punishment by adequate penalties.

The laws of Toro, (*Las leyes de Toro*) eighty in number, were published at the Cortes held in the city of Toro, in 1505, with a view to regulate the forms to be observed in making wills; to establish rules relative to testamentary successions, and successions *ab intestato*; to fix the donations of the third and fifth parts; (a) the manner of succeeding to estates by the law of primogeniture in Spain, and the alimony due from the father to his illegitimate children. These laws are inserted in the Recopilacion of Castille, in the titles in which they are classed, according to their order.

The Royal Ordinance (*El ordinamiento real*) made in imitation of that of Alcala, was sanctioned and published by Ferdinand and Isabella in 1496. Don Juan Sala (b) pretends that this ordinance has never received the royal sanction, though it appears to have been drawn up in obedience to the order of the sovereign. But this opinion is not embraced by other Spanish writers, among whom the

[a] Donations which a father or mother might make of a part of their estate, to some of their children, to the prejudice of the others—these were called donations of the third and fifth part, because they could not exceed these proportions.

[b] *Ilustracion del derecho Espana*. Preliminary remarks, vol. 1, p. 12.

author of the theatre of Spanish legislation, positively asserts, that the Royal Ordinance was authorised and published by Ferdinand and Isabella.

Without deciding this controversy, it will suffice to observe, that all the Spanish jurists agree, that in the tribunals of Spain, this ordinance, of which the greatest part has been inserted in the Recopilacion of Castille, is received as the highest authority. It is divided into eight books, which are again divided into titles.

We have now arrived at the code of laws, the Recopilacion of Castille (*Las leyes de Recopilacion*) which completes the system of Spanish legislation. It was published in the year 1567, under the authority of Philip II. who gave it the legislative sanction, and caused to be inserted in it the laws of the ordinance of Alcala, and those of the Royal Ordinance, which had not been repealed, as well as the whole of the laws of Toro, and those which had been promulgated in the intervening period. From the year 1567 to 1777, several new editions of the Recopilacion have appeared, to which the different laws, edicts and recripts published since its first promulgation, have been added at different times.

The title of Recopilacion (*compilation*) was equally given to the (*Autos Accordados*); that is to say the edicts and orders in council, which the king sanctioned and caused to be published by virtue of a Royal Decree, in one volume, divided into books and titles, in the same order which had been observed in

the publication of the Recopilacion of Castille. This work was published for the first time, in the year 1745, and now forms the last volume of the Recopilacion, with which it has been incorporated, in the 4th edition, with some unimportant additions. The two works are each composed of nine books, divided into various titles.

The most important book of the Recopilacion is the 5th, which treats of marriage and dowry; of the single and married life; of wills and successions; of the mode of dividing estates; of donations of the third and fifth parts; of the property and gains acquired by the husband and wife during marriage, and of the cession of goods by debtors.

Spain possessing immense dominions in North and South America, felt the necessity of regulating the government of those provinces, and of securing, by general and permanent laws, the obedience and welfare of the nations who inhabited them. The scattered laws therefore which had been promulgated for that purpose, at different periods, were collected, and digested by order of Philip IV. in the same form as the Recopilacion of Castille, under the title of the Recopilacion of the Indies, (*La Recopilacion de las Indias*) and published in the year 1661.

We have thus given a concise view of the history of Spanish jurisprudence, as relates to spiritual and temporal matters. It is, however, proper to remark that the different codes, of which we have spoken, contain only general principles of law, leaving

all questions which arise, concerning commercial and maritime affairs, to be decided by local laws. The Consulado del Mare, governs in all those ports in Spain, which are situated on the Mediterranean sea, where also the Capitulations of Barcelona are observed in all matters relating to insurance ; while the Ordinance of Bilbao is the law in all maritime causes arising on the shores of the Atlantic. Commercial and maritime controversies, arising in the Indies, form a third class, and are governed by what is called the *Contractacion*, or Consulate of Seville and Cadiz, and by the ordinances and regulations of the Supreme Council of the Indies. (1)

After this short account of the several codes of the laws existing in Spain, it is now proper to say something of the degree of authority, they respectively enjoy, in the tribunals of that country ; and especially in what manner they are to be received, and enforced in the courts of this state, in matters of a civil nature.

The third law, title 1st, book 2d, of the *Recopilacion* of Castille, prescribing the manner in which the laws of that code, of *Partidas* and of other codes, are to be observed, declares that the first in order, are the laws of the *Recopilacion* of Castille, and those that have been subsequently enacted : next the laws of the *Fuero Real*, and the municipal customs ; and finally, the laws of *Las Siete Partidas*. This law does not speak of the *Recopilacion*

(1) Azum's Maritime Law, vol. 1, p. 404, No. 5.

of the Indies, which was not compiled until long after the promulgation of the *Recopilacion* of Castille.

Murillo, an able Spanish law writer, speaking on that subject in his treatise entitled *Cursus Juris canonici, Hispani et Indici*, after having repeated what is said in law 3d, title 1, book 2, of the *Recopilacion* of Castille, says that the laws of the *Recopilacion*, of Toro, and the *Partidas*, ought to be enforced by judges, in all causes submitted to their decisions, even when it is alledged, that they have not been usually observed in the place. But that when the authority of the *Fuero Real*, and of the laws of *Estilo* is invoked, it is necessary to prove that they are conformable to the usages of the place, unless they be found in the *Recopilacion*; for then it is only necessary to plead them. (a)

Murillo speaks likewise of the manner in which the Spanish laws ought to be received in both Indies. On that subject he says, that in the Spanish dominions in the Indies, courts of justice should first have recourse to the Royal and Special Edicts (*Cedulas*), which may have been directed to the chancery of the city or place where the cause is pending; and if there are none, they should then decide according to the common law, which is to be found in the laws of the *Recopilacion* of the

(a) Such is the opinion of Azevedo, in his commentaries on the *Recopilacion* of Castille. This appears to be now a settled point, notwithstanding there are some authors who support the contrary doctrine. So likewise it has been determined, by the supreme court of this state, in the case of *Pizerot vs. the heirs of Meuillon*, 3. Mart. Rep. page 120.

Indies : and where these last are silent, recourse must be had to the Recopilacion of Castille and the Partidas. This author also observes, that the rescripts, or Royal Ordinances, are of no authority in the Indies, unless they have been directed to the Supreme Council of these countries : and finally he thinks (what must be considered as a general rule for all the Spanish dominions, either in Europe or in the Indies) that when all the royal laws are silent, it is better for judges to have recourse to the commercial than the civil or Roman laws, because it was formerly enacted in Spain, that whoever would cite in court the Imperial or Roman laws, should suffer death ; [a] and that therefore, the civil law could not be cited, as a law, but only as written reason. Murillo, Vol. 1, No. 23, p. 9.

It remains now to state, how it happened, that the laws of Spain, are still in force in Louisiana, since its transfer to the United States of America.

The customs of Paris and the ordinances of the kingdom, were observed in Louisiana, while it remained under the dominion of France, and by them all civil and criminal suits were determined. Justice was administered by a Supreme Tribunal composed of se-

[a] It appears that much of the rigor of the ancient laws of Spain on this subject, has ceased, as the study of the civil law, was tolerated in the Universities of that kingdom, even previous to the Edict in Council, (*Auto*) of the 24th May 1744, which ordered, that the Royal Code, or Statute, should be taught in the Universities, together with the Roman laws. *Auto* 3, tit. 1, book 2, of *Los Autos Accordados*.

veral judges, called the Superior Council, (*Le Conseil Superiur*) and one attorney general. This state of things, existed until the month of August 1769, when count O'Reilly took possession of that country, in the name of the king of Spain, in virtue of the treaty of cession, which France had made to that power. It is well known, that this treaty, though concluded and signed on the 3d of November 1762, was not made public before the 23d of April 1764; and that Spain did not take actual possession of the country before the year 1769, when count O'Reilly arrived, vested with extraordinary powers, and at the head of three thousand regular troops. The disaffection which the inhabitants of the country manifested when they heard of the treaty of cession, and that they were to pass under a foreign government; and the opposition which they intended to make, as it was supposed, to the landing of the Spanish troops when they arrived at the mouth of the Mississippi, gave rise to excessively rigorous measures against them, on the part of O'Reilly; one of which was to cause to be arrested, twelve of the most respectable citizens of New Orleans, six of whom paid with their lives, for the affection which they had shewn for their mother country, [a] while the others were thrown into dungeons at Havana. It was under these circumstances that O'Reilly issued a proclamation, changing the form of the government

[a] The father of James Villere, the present governor of this state, was among the number of the victims.

of Louisiana, abolishing the authority of the French laws, and substituting those of Spain in their stead. [a] This proclamation which

[a] As this proclamation has become very scarce, we will here insert a translation of it.

“ Don Alexander O'Reilly, Commander of Benfagan of the Order of Alcantara, Lieutenant-General of the Armies of his Majesty, Inspector General of the Infantry, and by Commission, Captain General of the Province of Louisiana.

“ Whereas, the prosecution which took place in consequence of the rebellion raised in this colony, have fully proved, the part and the influence the council had therein, by supporting contrary to their duty, acts of the greatest atrocity, while it was incumbent on them, to have used their endeavours, to maintain the people in that fidelity and subordination, which they owe to their sovereign ; for these reasons, and wishing to prevent such evils for the future ; it has become indispensable, to abolish said council, and to establish in its stead, the form of the political government, and administration of justice, which our wise laws prescribe, and by which all the states of his majesty in America, have ever been maintained in the most perfect tranquility, content, and subordination. For these considerations using the powers, which the king our Lord ; (whom may God preserve) has confided in us by a patent, issued at Aranjuez the 16th of April of this year, to establish in the army, the police, and in the administration, of justice, and of his finances, that form of government, dependance and subordination, which is consonant with his service and the happiness of his subjects in the colony ; we do hereby establish in his royal name a city council or cabildo, composed of six perpetual regidores, agreeably to the law 2d. tit. 10, book 5, of the Recopilacion of the Indies, and among whom shall be distributed the offices of *Alfarez Royal, Alcalde, Mayor Provincial, Alguazil Mayor*, depositary general, and receiver of the *Penas de Camara*, or fines accruing to the Fisc : and these shall elect on the first day in every year, two judges, who shall be called, ordinary alcaldes, a syndic, attorney-general, and an administrator of the city rents, and taxes, such as they are established by our laws, for the good government, and administration of justice. And whereas the want of lawyers in this country, and the little information these new subjects have of the laws of Spain, may render their faithful observance very difficult, which would be entirely contrary to the intention of his majesty, we have thought it useful, and even necessary, to cause an abstract of these laws, to be formed, in order to serve for the instruction of the public, and as elementary rules for the administration of justice, and municipal government of this city, until the knowledge of the Spanish language can be introduced, and thereby afford to every one, by the reading of these laws, the means of extending their information in that matter ; and therefore, and under the good pleasure of his majesty, we do order and command, that all judges, cabildoes, and their officers, do comply punctually with that, which is prescribed in the following articles. (here follows the ordinance establishing the new government, and their powers, all terminating with this subscription.)

“ At New Orleans, on the 25th of November 1769.

“ Signed)

DON ALEXANDRE O'REILLY.

“ Printed by order of his excellency Francois Xavier Rodriguez, secretary to the expedition.”

was accompanied by an ordinance, establishing the several branches of the new government of Louisiana, and defining their respective powers, appears to have been published on the 26th November 1769. From the time of its promulgation until now, the French laws ceased to have any authority in this country, and all controversies were tried and decided conformably to the Spanish laws, by a tribunal, of which the governor was the only judge, though he was bound to take the advice of a lawyer (*lettrado*) appointed and commissioned to that effect, by the king of Spain, and called the Auditor of War. From all the judgments of the governor's tribunal, there was an appeal to the Royal Audience, sitting at Puerto Principe, in the Island of Cuba, and presided by the capt. general of that Island.

The return of Louisiana under the dominion of France, and its transfer to the United States, did not for a moment, weaken the Spanish laws in that province. The French, during the short continuation of their power, from the 30th November to the 20th December 1803, made no alteration in the jurisprudence of the country ; and the government of the United States, left the task of legislation to the people of Louisiana themselves, giving to them, the right to make whatever changes they might deem necessary in the existing system of their laws, (see sect. 11, of the act to divide Louisiana into two territories, passed by Congress on the 26th of March 1804, and the fourth section of another act passed the 2d

March 1805, to provide for the government of the territory of Orleans. See likewise sect. 4 of the schedule annexed to the constitution of this state.)

However the legislature of the territory of Orleans, as early as the year 1807, considering that the ancient laws secured to the inhabitants of Louisiana by the acts of Congress, were written in a foreign language, and contained in books difficult to be procured, ordered a digest of those laws to be made and prepared in the English and French languages, by two jurisconsults. This digest was adopted, by an act passed the 31st March 1808, but was not promulgated before the month of November of the same year, when printed copies of it were officially sent to all the tribunals of the territory of Orleans. This code commonly known under the name of the Civil Code, is therefore become a part of our statute laws. But it is easy to perceive, that a work of that nature, however excellent it may be, can only contain general rules and abstract maxims, still leaving many points doubtful in the application of the law ; hence the necessity of going back to the original source, in order to obtain new and additional light. It was moreover perceived that the Civil Code did not contain many and important provisions of the Spanish laws still in force, nor any rules of judicial proceedings ; that the statutes regulating these proceedings had proved insufficient ; and that the Superior Court had in divers instances, and particularly in the case of Cottin vs. Cottin, Martin's Rep. vol. 5, p.

93; determined that the Spanish laws "must be considered as untouched, whenever the alterations and amendments introduced in the digest do not reach them ; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code." It thus appeared that a much greater portion of the Spanish laws remained in force than had been at first supposed. It was then doubtless the desire of the legislature to spread generally the knowledge of such of these laws, as are not to be found in the Civil Code, or in the digest of our statutes, that induced them to make provisions for the printing of this translation. They felt the force and justice of that acknowledged rule of reason, that in order to enforce obedience to the laws, it is necessary that they should be fully understood by the people.

The plan pursued by the translators in this work is very simple. Each title of the *Partidas*, is preceded by a list of the titles of the Roman and Spanish laws, and of the Civil Code, relative to the subject it treats of, together with an index of the articles therein contained.

Each law is accompanied by a note, referring to the corresponding laws of the *Recopilacion*, and of the *Autos Accordados*, according to the quotations contained in the edition of the *Partidas*, published with the commentaries of Gregorio Lopez. The *Recopilacion* of Castille will be designated by the letter R, followed by Arabic ciphers, the

first designating the law, the second the title, the third the book referred to. The *Autos Accordados*, will be designated by the word *Auto*, followed by the number of the law, title, and book, cited.

The laws in accordance, or at variance, with those of the Civil Code, are likewise accompanied by notes, referring to the provisions of the latter, which treat of the same subject. The Civil Code will be designated by the letter C, followed by ciphers, the first designating the law, the second the title, and the third the book. When no reference is made to the Civil Code, it is to be inferred, that it contains no law similar to that of the *Partidas*.

As it is often a difficult task, even for lawyers, to determine, whether a law is in force or not, the translators have thought proper to give the translation of all those laws which have not been expressly repealed by the legislature, or which are not repugnant to the constitution of the United States, or to that of this state, leaving to the proper tribunals to determine whether they are in force or not.

When a proper term could not be found in the English language, to render the legal sense of a Spanish word, the translators have made use of the Spanish word itself, after giving an explanation of it, whenever its meaning is not set forth in the law, in which it is used. And when the term could not be translated by one precisely equivalent in English, the word in Spanish is given between

parenthesis, in order that the reader may determine for himself.

When the notes found in various parts of this translation, are quoted from Spanish authors, the names of such authors are given. Those which are not accompanied by any name, are the notes of the translators themselves.

Such is the plan adhered to in this translation, which will be terminated by a general index of all the matters contained in the two volumes of which it will consist. The particular care and attention which the translators have bestowed, in order to render this work as perfect as possible, will, they hope, secure to them, the praise of having faithfully discharged the honorable task imposed on them by the legislature. They will consider themselves as fully rewarded for their labour, if they are so happy as to have been the means of making the public acquainted with the justly celebrated code of the Partidas, which, if it is not the best, is certainly equal to any the world has ever seen.

HERE COMMENCES

THE FIRST PARTIDA,

WHICH TREATS OF EVERY THING APPERTAINING TO THE

CATHOLIC FAITH,

BY WHICH

MEN OBTAIN A KNOWLEDGE OF GOD,

THROUGH BELIEF.

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code of Louisiana, that relate to the title of LAS SIETE PARTIDAS, which treats of Laws.

Digest lib. 1. tit. 3. *De legibus, senatus consultis et longa consuetudine.*

Digest lib. 22. tit. 6. *De juris et facti ignorantia.*

Institutes lib. 2. tit. 2. *De jure naturali, gentium et civili.*

Code lib. 1. tit. 14. *De legibus et constitutionibus principum, et edictis.*

Domat's Civil Law, preliminary title vol. 1. tit. 1.

Fuero Juzgo, book 1. tit. 1 & 2.

Fuero Viejo, book 5. tit. the last.

vol. 1.

C

Fuero Real,	book 1. tit. 6.
Leyes del Estilo,	laws 200 & 238.
Ordenamiento DeAlcala, . .	tit. 28.
Ordenamiento Real,	book 1. tit. 4.
Recopilacion de Castilla, . .	book 2. tit. 1.
Autos Accordados,	book 2. tit. 1.
Recopilacion de las Indias, .	book 2. tit. 1.
Civil Code,	book 1. preliminary tit. p. 1.

TITLE I—WHICH TREATS OF LAWS.

The object of the Laws,	LAW 1
Of the Laws of Nature and of Nations,	2
Of the division of Laws,	3
Why they are called Laws,	4
Of the force of Laws,	5
Whence these Laws are derived,	6
Of the Laws concerning religious belief and those which appertain to the government of the peo- ple,	7
Of the essential qualities of Laws,	8
How Laws ought to be made,	9
The advantages which arise from Laws,	10
What ought to be the qualifications of a legislator,	11
Who has the power to make Laws,	12
How Laws are to be understood,	13
Who has the power to expound doubtful Laws,	14

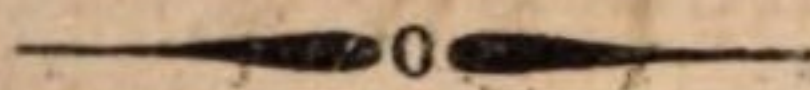
NOTE.

Reference to the Recopilacion de Castilla, will be made by the letter R. followed by ciphers ; the first indicating the law, the second the title, and the third the book.

To the Civil, by the letter C. followed by ciphers ; the first indicating the article and the second the page.

When the translation of a law is abridged, it will be noticed at the end by the letter (A.)

In what manner we ought to obey the Laws and be judged by them,	LAW 15
That every one is bound to obey Laws,	16
How Laws ought to be amended,	17
That Laws ought not to be repealed without rea- sonable cause, and in what manner it ought to be done,	18
How Laws, made hereafter, are to be added to this Code,	19
Why no man can excuse himself from being tried by the Laws, under pretence that he was igno- rant of them,	20
Who may be excused on account of ignorance of the Laws,	21



TITLE 1.

WHICH TREATS OF LAWS.

LAW 1.

The Object of these Laws.

THESE Laws are established that men may learn to live uprightly, according to the will of God, and to conduct themselves with justice and equity towards their fellow creatures. We have inserted in the first part of this work, all the rules relative to religious belief, conformably to what is prescribed by the church; and in the six following, all the Laws relative to civil rights. (A) (1)

(1) *R. l. 9. tit. 1. b. 2.*

LAW 2.

Of the Laws of Nature and of Nations.

The law of Nature is that which is common to men and animals ; whereas the law of Nations is that which is applicable to men only. (A)

LAW 3.

Of the Division of Laws.

Though all Laws are alike founded in justice, yet as to their objects, they are divided into two parts ; the one being established for the good of the soul, and the other for the preservation of the body. (A) (1)

LAW 4.

Why they are called Laws.

Law, (*Ley*) so called from *Leyenda*, reading, is a written declaration which contains precepts, and decrees punishments, in order to restrain men from doing evil, and to teach them to do good. It is moreover called Law, because all its commands should be loyal, (*leales*) and equitable, conformably to justice and the will of God. (2.)

LAW 5.

Of the force of Laws.

Laws regulate things sacred and profane. They ordain, prohibit, reward and punish. (A) (3)

(1) *R. l. 3. tit. 1. b. 2.*

(2) *R. C. ll. 2 & 3 tit. 1. b. 2. C. art. 2. p. 2.*

(3) *C. art. 2. p. 2.*

LAW 6.

Whence these Laws are derived.

These Laws are derived both from the words of the Saints, who wrote concerning the welfare of man, and the salvation of his soul ; and from the opinions of sages who have fixed the principles upon which temporal things should be regulated, agreeably to reason and equity. (A) (1)

LAW 7.

Of the Laws concerning Religious Belief, and those which appertain to the Government of the People.

As a belief in a Saviour appertains to the Laws which regulate faith, from which spring the fear and love of God ; so the Laws that are made for the government of the people, give rise to justice, by which they are taught to conduct themselves with regularity, and to cherish one another. (A) (2)

LAW 8.

Of the essential qualities of Laws.

Laws ought to be reasonable ; compiled with great care, and founded upon what happens in the common course of things. They should be free from all contradiction ; expressed in a language correct, simple, and clear, so that they may be understood and retained with ease. (A) (3)

(1) *R. C. l. 1. tit. 1. b. 2.*(2) *R. l. 1. tit. 1. b. 1 & l. 3. tit. 1. b. 2.*(3) *R. 1 l. 8 tit.. b. 2. C. art. 2. p. 2.*

LAW 9.

How Laws ought to be made.

Laws ought to be made with the advice of intelligent, impartial men, versed in the science of jurisprudence. They ought to be free from error, and carefully revised before they are published, that they may do honor to the legislator, and promote the welfare of the people whom they are intended to govern. (A)(1)

LAW 10.

The advantages which arise from Laws.

The advantages arising from Laws, are, that they teach men to know, to fear, and love God : to be obedient and faithful to their prince, and to love their neighbors, so that they will not do to others what they would not that others should do to them. Also, by observing the Laws, men live in peace, flourish and become rich ; population increases ; the kingdom is aggrandized and wickedness repressed. (A)(2)

LAW 11.

What ought to be the Qualifications of a Legislator.

A Legislator ought to be actuated by the love of God, that the laws he makes may be just and perfect. He ought to cherish justice, and look solely to the public good. He ought to be able to discover right from wrong, and not to be ashamed to correct an unjust Law that he had made, when he discovers his error. (3)

(1) R. ll. 3 & 8. tit. 1. b. 2.

(2) R. ll. 1 & 3. tit. 1. b. 2.

(3) R. l. 3. tit. 1 b. 2.

LAW 12.

Who has the Power to make Laws.

The Emperor or King may make Laws for the government of his people, and no other person has the right to legislate upon temporal things, unless authorized by the sovereign : Laws made in any other manner, have neither the name nor force of Law, nor can ever be valid.

LAW 13.

How Laws are to be understood.

Laws are to be construed purely and simply, in their most natural and useful sense, according to the language in which they are expressed ; and ought never to be written by abbreviations, but in words at length. Hence the sages have said that the science of law consists less in studying and retaining its letter, than in penetrating its true meaning. (1)

LAW 14.

Who has the Power to expound doubtful Laws.

When doubts arise concerning the meaning of a law, whether from an error in committing it to writing, or from the obscurity of the expressions made use of by the legislator, it belongs to the legislator alone to explain such doubts. (A) (2)

LAW 15.

In what manner we ought to obey the Laws, and be judged by them.

The subjects of a Prince by whom the Laws are

(1) *R. l. 3. tit. 1. b. 2. C. art. 14. p. 4.*

(2) *R. l. 3. tit. 1 b. 2. C. art. 16. p. 4.*

made, are bound to obey them ; and it is by their provisions, and not those of any other laws, that they are to be adjudged. And so of persons not the subjects of the Prince, relative to the contracts they make, and the crimes they commit in his dominions. And the Prince himself ought to obey the laws, though he cannot be compelled thereto by any authority whatever. (1.)

LAW 16.

That every one is bound to obey the Laws.

The King ought to observe the Laws, because they are his own work, and because he is clothed with power that he may do justice to every one. The people ought to observe them, because they are their life and protection : so that no person can dispense with the obedience he owes to them. (A) (2)

LAW 17.

How Laws ought to be amended.

When it is necessary to amend a Law, the king ought not to do it, without the advice of men versed in the science of jurisprudence. And the changes thus made, must be published throughout all the provinces. (A) (3)

LAW 18.

That Laws ought not to be repealed, without reasonable cause, and in what manner it ought to be done.

Laws ought not to be repealed, unless they fail to produce the good intended ; as where they contain

(1) R. l. 3. tit. 1. b. 2.

(2) R. l. 3. tit. 1. b. 2. Anto 1. tit. 1. b. 2.

(3) R. ll. 3 & 7. tit. 1. b. 2.

provisions contrary to the divine law, or the rights of the sovereign, or the public weal, or produce some other manifest evil. And even then, not without the advice of the most wise and distinguished persons of the kingdom, after a full investigation of the injury or benefit they are calculated to produce. And if, upon such examination, it appear that they are productive of more harm than good, they ought to be wholly repealed. But if they contain some wholesome provisions, mixed with others that are bad, the latter may be retrenched, and the good retained. (A) (1)

LAW 19.

How Laws, made hereafter, are to be added to this Code.

If there should happen cases not provided for by this Code, for which it may be necessary to make new laws, the king ought to assemble together experienced and wise men, to assist him in devising the most eligible means of making them ; and when made, they ought to be inscribed as well in the royal register, as in the other registers of the kingdom. They will then have the same force as the former laws, and sometimes more ; inasmuch as daily experience discovers imperfections in the ancient laws, and they become in a manner obsolete by long usage. (2)

LAW 20.

Why no man can excuse himself from being tried by the Laws, under pretence that he was ignorant of them.

Ignorance of the Laws will excuse no man from the

(1) R. l. 8. tit. 1. b. 2. Anto 1. tit. 1. b. 2.

(2) R. ll. 3 & 7. tit 1. B. 2.

penalty they inflict. For since it is by them that he is protected, and his rights secured, it becomes his duty to read and understand them : and if he cannot read, then he ought to acquire a knowledge of them through the assistance of others. For the plea of ignorance alone can avail him nothing in any case, though considerations that are personal may, as is prescribed in the following law. (A) (1)

LAW 21.

Who may be excused on account of ignorance of the Laws.

The madman or idiot is exempt from the penalty of the law, for offences committed during his frenzy or folly. Male children under the age of fourteen years, and females under the age of twelve years and six months, are exempt from the penalty ordained against fornicators ; and minors, of both sexes, under the age of ten years, from the penalties of other offences. (2)

[The remainder of this Law is not in force.]

(1) *R. l. 2 tit. 1 b. 2.*

(2) *R. l. 2. tit. 1. b. 2. Anto 19. tit. 11. b. 8.*

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code of Louisiana, which relate to the title of **LAS SIETE PARTIDAS**, on Usage, Custom, and *El Fuero*.

Digest, lib. 1. tit. 3. *De legibus, senatusque consultis et longa consuetudine.*

Code lib. 8. tit. 53. *Quae sit longa consuetudo.*

Domat Civil Law, in the Treatise of the Laws, chap. xi. No. 46, and preliminary title, sec. 1, No. 10, and sec. 2, No. 19.

Leyes del Estilo - - - - - Law 241.

Recopilacion de Castila - - - Law 1, tit. 7, book 5.

TITLE 2. ON USAGE, CUSTOM AND EL FUERO.

What Usage is - - - - -	LAW 1
In what manner Usage is established - - - - -	2
In how many ways Usage may be established by time	3
What Custom is, and how many sorts there are - -	4
Who can establish a Custom, and in what manner it is done - - - - -	5
What is the force of Custom - - - - -	6
What is meant by <i>Fuero</i> , and why it is so called - -	7
In what manner the <i>Fuero</i> is established - - - - -	8
How the <i>Fuero</i> is abrogated - - - - -	9

TITLE 2.

OF USAGE, CUSTOM AND THE FUERO. (1)

LAW 1.

What Usage is.

Usage (*Uso*) is that which arises from certain things which men say, and do, and practise, uninterruptedly, for a great length of time, without any hindrance whatever. (2)

LAW 2.

In what manner Usage is established.

Usage ought to be established in such manner, as to promote the general good, without producing any partial injury. Not secretly and clandestinely, but in such way, that it may be known and assented to by those who have a knowledge of the law, and capacity to oppose it.

LAW 3.

In how many ways Usage may be established by time.

Usage may be established by time in five different ways. First, where good arises from it, and not evil, as is above said. The second, where it is publicly and knowingly established. The third, where it is established with the consent of those who are capable of opposing it. The fourth, where it contains nothing

(1) The Spanish word *Fuero* has various significations. Sometimes it means the usage and custom of a place or province; at others, a body of laws, and at others again, the jurisdiction over which the authority of a judge extends. *Feb. part. 2—ib. 3. ch. 1. s. 1. No. 35, Fernandez Prieto y Sotelo, del derecho Real, ch. 5—ib. 2. No. 6.*

(2) *R. l. 1. tit. 2. B. 7.*

contrary to law ; and the fifth, where it is established by the order or permission of the sovereign. (A) (1)

LAW 4.

What Custom is, and how many sorts there are.

Custom (*Costumbre*) is an unwritten law, established by usage during a long space of time, in relation to those things which give rise to it. And it is either general or special : general, when it relates to both persons and places ; and special, when it relates to certain particular things, places or persons. (A) (2)

LAW 5.

Who can establish a Custom and in what manner it is done.

By the people (*pueblo*) is understood all the inhabitants of any country or place, without distinction.— And if all, or a greater part of them, observe any usage for a term of ten or twenty years, with the knowledge of the sovereign, and without being opposed by him ; such usage will have the force of custom, if, during that time, there had been pronounced two uncontradicted judgments conformably thereto ; or a decision, declaring the existence of such a custom, after it had been disputed. Usage, to have the force of custom, ought moreover to be reasonable, not contrary to the laws of God, the empire, or natural law : nor to have been established through error ; for otherwise it would be an abuse, and could have no effect. (3)

(1) *R. l. 1 tit. 2 b. 7.*

(2) *R. l. 9. tit. 5. b. 3—ib. l. 1. tit. 2. b. 7—ib. l. 21. tit. 1. b. 9. C. art. 3. p. 3.*

(3) *R. l. 1. tit. b. 2.*

LAW 6.

What is the force of Custom.

The force of custom is very great, when founded in reason, as we have above said. For when disputes arise about matters upon which there is no written law, they can be decided by custom ; and in that respect custom has the force of law. Custom may also serve to explain the law, when doubts arise upon its construction ; for then it is to be understood in the same manner in which it had been usually before understood and enforced.— Custom may even have the effect to repeal anterior laws, when the sovereign has permitted it to be observed against the provisions of those laws, during the time above prescribed, or longer. This is understood, where the custom is general over the whole kingdom ; for if it be confined to a particular place, it repeals the law of that place, only where the custom is observed. Custom may be abolished in two ways. The first, when another custom is established in opposition to it, by the command of the sovereign, and with the consent of the inhabitants of the place where it is observed ; under the belief that the present times and circumstances render the custom last adopted, more advantageous than the former. The second, by written laws of a contrary nature, afterwards enacted : for these should be observed, and not the former custom. (1)

LAW 7.

What is meant by Fuero, and why it is so called.

Fuero is composed of usage and custom, both of

(1) *R. l. 3. tit. 1. b. 2.*

which are necessary to its validity ; it then has the force of law. It differs from usage and custom in this, that these last apply to special and particular objects, and are observed in a greater or less number of places : whereas the *fuero* extends to the whole kingdom, and embraces all that appertains to judicial decisions. It is therefore more public and general than either usage or custom : and hence it takes the name *Fuero*, from the Latin *forum*, which was the public market place, among the ancient Romans. (A.)

LAW 8.

In what manner the Fuero is established.

The *Fuero* ought to be established with the advice of upright and skilful men, the permission of the sovereign, and the consent of those who are to submit to it. When so established, it ought to be observed in every place, and will have the force of law. (A)

LAW 9.

How the Fuero is abrogated.

When it shall appear that either the *fuero*, usage or custom, are productive rather of evil than good, they ought then to be abrogated. (A)

✎ No part of the remaining laws of the first Partida, or of those of the second, are in force in Louisiana. The translators have, therefore, contented themselves with annexing a table of their titles, for the sake of order, and the satisfaction of the reader.

TABLE OF THE TITLES,

Of the First Partida, not translated.

TITLE 3. Of the holy trinity and catholic faith.

4. Of the seven sacraments of the church.

5. Of the prelates of the church who are bound to instruct in the faith and administer the sacraments.

6. Of the clergy ; the duties they are bound to perform, and the things they are forbidden to do.

7. Of the religious order.

8. Of the vows and promises made to God and the Saints.

9. Of excommunication, suspension, and interdiction.

10. Of churches, and how they ought to be built.

11. Of the privileges and exemptions enjoyed by churches and their burying grounds.

12. Of monasteries, their churches and other religious buildings,

13. Of burials.

14. Of the unalienable effects of the church.

15. Of the right of advowson.

16. Of ecclesiastic benefices.

17. Of simony.

18. Of sacrilege.

19. Which treats of the first fruits.

20. Of the tithes which christians are obliged to give.

21. Of the peculium of the clergy.

22. Of the procurations, quit rents, and the duties to be paid to the church.

TITLE 23. Of observing holidays, fast days, and how alms are to be given.

24. Of pilgrims.

TABLE OF THE TITLES,

Of the Second Partida, not translated,

WHICH TREATS OF THE KINGS AND OTHER GREAT LORDS OF
THE EMPIRE.

TITLE 1. Of the emperors, kings, and other great lords.

2. That the king should know, and fear, and love God.

3. Of the duty of the king in relation to his own thoughts.

4. Of the duty of the king in relation to his words.

5. Of the duty of the king in relation to his actions.

6. Of the duty of the king towards his spouse, and her duty towards him.

7. Of the duty of the king towards his children, and their duty towards him.

8. Of the duty of the king towards his other relations, and their duty towards him.

9. Of the duty of the king towards his officers, the persons of his court and household.

10. Of the duty of the king towards his subjects.

11. Of the duty of the king towards his kingdom.

TITLE 12. That it is the duty of the people to know, to fear, and love God, and their king.

13. That it is the duty of the people to know, to honor and protect their king.

14. That it is the duty of the people to protect the spouse of the king, her daughters, and other female relations, her maids of honor, and the other women about her person.

15. Of the duty of the people in relation to the children of the king.

16. Of the duty of the people towards the officers of the king, those of his court, and towards other persons who attend there.

17. That it is the duty of the people to preserve the property, both moveable and immovable, which the king possesses for his maintenance.

18. That the people ought to watch over, to furnish and defend the castles and fortresses of the king and kingdom.

19. That it is the duty of the people to protect the king against his enemies.

20. Of the duty of the people towards their native country.

21. Of the nobles, and what it is incumbent on them to do.

22. Of the light troops, their commanders, and the infantry.

23. Of war carried on by land.

24. Of war carried on by sea.

25. Of the indemnities of war, called in Spain *Enchas*.

26. Of the division of the spoils of war.

TITLE 27. Of the honors of war, and how they ought to be conferred.

28. Of military punishments.

29. Of captives, their effects, and of the places which fall into the hands of the enemy.

30. Of those who redeem captives.

31. Of public schools, instructors and scholars.

PARTIDA THIRD,

WHICH TREATS OF

JUSTICE,

AND HOW IT IS TO BE ADMINISTERED IN EACH PLACE, TO THE
END, THAT SUITS MAY BE TERMINATED BY

JUDGMENT AND EXECUTION.

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code
of Louisiana, that relate to the title of LAS SIETE PAR-
TIDAS, which treats of Justice.

Digest, lib. 1. tit. 1. *De Justitia et Jure.*

Digest, lib. 50, tit. 17. *De diversis regulis.*

Justitulis, lib. 1. tit. 1. *De Justitia et Jure.*

Domat's Civil Law, preliminary title, vol. 1. tit. 1.

TITLE I.—OF JUSTICE.

What Justice is, - - - - -	LAW 1
The Good arising from Justice, - - - - -	2
What are the precepts of Justice, - - - - -	3

TITLE I—OF JUSTICE.

LAW 1.

What Justice is.

Justice is a constant and fixed will, in the minds of all good men, to give to every one his own, and may be compared to an imperishable fountain. (A) (1)

LAW 2.

The good arising from the observance of Justice.

The greatest advantage arises from the observance of justice. By it men are taught to conduct themselves with propriety, uprightness, and moderation. It rewards and encourages the good to become better, and its chastisements bring back the wicked to the path of virtue : by it the world is sustained, and peace maintained among men. It ought to be loved as a father or mother ; respected and obeyed as a good master, and cherished as life itself. (A) (2)

LAW 3.

What are the precepts of Justice.

The precepts of Justice consist in living honestly, in doing no harm to others, and in giving every one his own. (A) (3)

(1) *R. ll. 1 & 2. tit. 1. b. 2.*

(2) *R l. 2. tit. 1. b. 2. l. 13. t. 4. b. 3.*

(3) *R. ll. 2 & 3. tit. 1. b. 2.*

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code of Louisiana, that relate to the title of LAS SIETE PARTIDAS, on Plaintiffs.

Digest, lib. 2. tit. 13 - *De Edendo,*

Code, lib. 2. tit. 1 - - *De Edendo.*

Gode, lib. 6. tit. 5 - - *Qui legitimam personam Standi in
Judiciis habeant, vel non.*

Fuero Juzgo, - - - - - book 2. tit. 2.

Recopilacion de Castila, book 4. tit. 2.

Autos Acordados - - - Auto 1. tit. 8. book 2.

TITLE II—OF THE PLAINTIFF.

What is meant by Plaintiff, - - - - -	LAW 1.
The Plaintiff ought to consider well against whom he brings his suit, - - - - -	2
In what way the son or grandson, may sue the father or grandfather, when he is no longer in their power, - - - - -	3
That one brother cannot sue another, except in certain cases, - - - - -	4
That husband and wife cannot sue one another, except in certain cases, - - - - -	5
That servants ought not to sue their masters, ex- cept in certain cases, - - - - -	6
When the son of the family may sue without his guardian, - - - - -	7
When the master cannot appear in court against his slave, and the slave against his master, ex- cept in certain cases, - - - - -	8
In what cases a slave can appear in court in behalf of other persons, - - - - -	9

That the members of religious orders cannot appear in court, without the intervention of their superior, LAW 10	
That the judge ought to appoint some person to answer to a suit brought against a minor, who has no tutor in the place, - - - - -	11
That the judge ought to appoint a curator, to an- swer for a person, whose estate is abandoned, - -	12
That where a man has a suit to bring against the council of any place, or against any corporation or convent, he must institute it against their a- gent or attorney in fact, - - - - -	13
How suits may be brought against persons not men- tioned in the preceding law, - - - - -	14
Of what the plaintiff should inform himself, when he is about to bring a suit, - - - - -	15
That things moveable, for which there exists a suit, ought to be produced in court, - - - - -	16
What other things ought to be produced in court, -	17
What ought in justice to be done, where the thing, claimed of the defendant, has been lost without his fault, - - - - -	18
What penalty they deserve who destroy or convey away a moveable thing, for which a suit exists, -	19
What the law requires, where the defendant fails to produce the thing for which he is sued, - - -	20
In what place the defendant is obliged to exhibit or deliver the thing for which he is sued, - - - - -	21
If the defendant has conveyed away the thing for which he is sued, he should make it known when he is required to produce it in court, - - - - -	22
What the law requires, where the defendant refuses to produce in court, the moveable thing for which he is sued, - - - - -	23
What is the law, where the judge decides in favor of the defendant, although he had the thing in his possession, - - - - -	24

That the plaintiff ought to describe with certainty the thing he claims, - - - - -	LAW 25
What things may be sued for in general terms, without specifying them particularly, - - - - -	26
What is property and possession, the difference between them, and how they are to be respec- tively sued for, - - - - -	27
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TITLE II.

LAW I.

What is meant by Plaintiff.

A plaintiff in law, is he who institutes a suit to obtain justice, whether on account of a debt due him, or of an injury he had received in time past, for which he had not been redressed ; or on account of one he then suffers, by being deprived of, or disturbed in the enjoyment of a thing in his possession, or to which he has some right : and so, likewise, with regard to rights which he expects to have in time to come, when he fears something will be done by which he might thereafter lose or be deprived of the enjoyment of them. (1)

(1) *R. l. tit. 2. b. 4.*

LAW 2.

The Plaintiff ought to consider well against whom he brings his suit.

When a man intends to institute a suit, he ought before he begins, to consider well against whom he brings it; for the defendant may be a person who cannot be sued, except in certain cases: as where the plaintiff is under the paternal authority of his father or grandfather, he cannot bring an action against either of them, because of the natural obligation he owes them, and because they live together, and he is under their power; and so where the plaintiff is under the authority of one who has adopted him, and who then stands in the place of a parent. Nevertheless, he may sue his father, grandfather, or adopted parent, while he is yet under their power, for any thing exclusively his own: as for the wages he had earned by his military services; or for the spoils he had acquired in war. And this the ancients permitted in honor of military men, and to encourage a taste for deeds of arms.

And so he may sue for the wages he had acquired for instructions given in schools, by which learning was propagated, and the country benefited. And so judges and notaries may sue for the emoluments they make in the king's courts, cities or towns.

And so where a dispute arises between the son and father, or grandson and grandfather, relative to their filiation, and they refuse to acknowledge their respective descendants, or to furnish them with subsistence, when they were able to do it. And the son may likewise sue his father or grandfather, to obtain an emancipation from their power, when their treatment was

insupportably cruel, or where they advise or assist him to do evil. We likewise ordain, that if the father or grandfather dissipates, or converts to a bad use, the estate which their son or grandson, under their power, had derived from any other source than themselves, the son or grandson, if of age, may sue them to obtain possession of such estate ; and if not of age, then the judge, before whom the suit is brought, ought to put the estate under the care of some good and impartial man, selected for that purpose. Nevertheless, if the father or grandfather were in want, they would be entitled to receive as much of the rents or income of the estate as was necessary for the maintenance of themselves and son or grandson ; in such a way that they could not alienate the estate itself, nor convert it to an improper use, but leave it to be preserved as the property of the son or grandson, to be by them used as their necessities required. (1)

(No other part of this law in force.)

LAW 3.

In what way the son or grandson may sue the father or grandfather, when he is no longer under their authority.

(Not in force.)

LAW 4.

That one brother cannot sue another, except in certain cases.

(Not in force.)

LAW 5.

That husband and wife cannot sue one another, except in certain cases.

Husband and wife form a union, consecrated by the Deity, in which there should ever reign perfect love

(1) *R. l. 4. tit. 2. b. 4.—ib. l. 4. tit. 2. & l. 16. tit. 3. b. 4.*

and harmony. The ancient sages, have therefore thought proper to give to the husband the administration and use of the wife's estate, to supply his wants, when he stood in need, on condition to furnish her with what was necessary, according to her fortune and rank. And though, notwithstanding, one of them should take something belonging to the other, neither he from whom it was taken, nor his heirs, could complain against the other as for a *theft*, though they might sue for the restitution or value of the thing. (1)

(No other part of this law in force.)

LAW 6.

That servants ought not to sue their masters, except in certain cases—(Not in force)

LAW 7.

When the son of the family may sue without his guardian.

When any one intends to institute a suit against the son or grandson, under the power of their father or grandfather, he must institute it in the presence of him, under whose power the defendant is ; otherwise the proceedings will not be valid. But if the father or grandfather be absent, the plaintiff may require the judge of the place, where he brings the suit, to appoint a curator *pro hac vice*, to the defendant, who will act as his attorney in the cause. By this means the suit will be regularly begun. The same formalities must be observed, where the plaintiff, who is under the power of

(1) *R. l. 27. tit. 3. b. 6—ib. l. 4. tit. 3. b. 5—ib. l. 3. tit. 9. b. 5—ib. l. 3 & 6. tit. 9. b. 5.*

any one, intends to institute a suit against any other person. For if he, under whose power he is, be absent, from the place where the suit ought to be brought, the son or grandson may bring it himself, if he be twenty five years of age. But if he be a minor, the judge ought to appoint for him a curator *ad litem*, to aid him in the suit, that he may sustain no injury thereby. In this way he may bring his action during the absence of him under whose power he is. (1)

LAW 8.

That the master cannot appear in court against his slave, nor the slave against his master, except in certain cases.

If the master have cause of complaint against his own slave, he cannot seek redress by a suit at law ; but he may chastise him by words or blows, in such a manner as not to wound or kill him. Yet, if the slave belong to another person, an action will lie against the master for any misconduct of his slave, and the master would be obliged to plead to it. For a slave cannot legally appear in court, as he has no controul over himself, but is under the dominion of his master, who is above him. Nevertheless, there are certain cases in which a slave may appear and sue in person ; as where the testator by his last will, had ordered that one of his slaves should be enfranchised, and the person so ordered, fraudulently conceal the writing, in which his liberty was conferred on him : the slave may then appear and sue the person who withholds such writing. We also say, that where a slave possesses money, which

(1) *Auto 12. tit. 6. b. 3. C. art. 86. p. 74.*

he acquired of any one else, and which did not belong to his master, and he give it to any person to keep, who promises to buy him of his master, and enfranchise him : if such person, after having received the money, refuse to buy the slave according to promise, or having bought him, refuse to enfranchise him, the slave may then appear in court, and sue for a specific performance of the obligation. And so it would be, if any one had stipulated with a slave to buy him of his master, under a promise to enfranchise him, whenever he had reimbursed the purchase money ; and should, after he had bought him, refuse either to receive the money and set him free, or having received it, should refuse to enfranchise him according to agreement. (1)

LAW 9.

In what cases a slave can appear in court in behalf of other persons.

We also say, that if a slave commit an offence which is punished with death or loss of limb, and it be proved against him, he may be cited to answer to the charge, without the intervention of his master. (2)

(No other part of this law in force.)

LAW 10.

That members of religious orders cannot appear in court without the intervention of their superior.

If a monk, or other person, were indebted before they became members of a religious order, they cannot afterwards be cited personally to appear in court ; for

(1) *R. l. 16 tit. 11 b. 5.*

(2) *R. l. 16. tit. 11. b. 5. C. art, 19. p. 40.*

as soon as they made a vow to join the order, they are considered as dead to the world. Whoever, therefore, has any claim against them, must cite their superior ; for he is obliged to answer to the suit, or to provide some person to do it, as all their effects have passed to the monastery of which he is superior. And the monastery will be responsible for the amount of the effects received from the monk, and no more ; for as they were content to receive his estate they ought to sustain the charge with which it was incumbered. The same rule ought to be observed, where the king, or other person for him, confiscates the estate of a man on account of any crime committed by him, and afterwards a suit be brought against the delinquent for a debt contracted before he had committed the offence. In that case the suit may be brought against the king, or other person who holds the confiscated property for him, for the full amount of the same. But if the debt be less than the value of the property, the remainder will belong to the king ; if greater, the king will not be obliged to pay for more than he had received.

(No other part of this law in force.)

LAW 11.

That the judge ought to appoint some person to answer to a suit brought against a minor who has no tutor in the place.

No suit can be instituted against a minor, under twenty five years of age, unless in the presence of the guardian of his person and property. And if he have no guardian, the plaintiff may apply to the judge of the place to appoint a person to assist and answer for him to the suit ; and it shall be the duty of the judge

to select, for that purpose, some discreet unsuspected person from among the relations or neighbors of the minor, to defend the suit for him, and watch over his interests, as is prescribed in part, 6, tit. 16. If a suit be brought against a minor, without observing these formalities, the judgment rendered against him will not be valid : but it will be valid if rendered in his favor, and to the prejudice of the plaintiff. (1)

LAW 12.

That the judge ought to appoint a curator to answer for a person whose estate is abandoned.

It may happen that the person against whom the plaintiff wishes to bring a suit, is either in captivity, or absent, or dead without heirs, and his property abandoned ; in that case, the plaintiff may petition the judge of the place to appoint a curator to the estate of such person, to defend him in the suit ; and it shall be the duty of the judge to appoint one accordingly, as the owner is not present to defend the suit, nor any person for him. And when such curator is appointed, the suit may be instituted against him, and every thing that he does therein, legally and without fraud, shall be as valid as if the owner of the property had been present ; provided the formalities herein prescribed, are observed, and not otherwise : But if the estate be too considerable to be managed by one curator alone, a greater number may be appointed, each of whom may appear in court, either as plaintiff or defendant, touching that portion of it confided to him, in the same manner that

(1) *R. l. 14. tit. 3. b. 2. C. art. 86. p. 74.*

guardians of minors could concerning the estate they administer for them. (1)

LAW 13.

That where a man has a suit to bring against the council of any place, or against any corporation or convent, he must institute it against their agent or attorney in fact.

Where a man wishes to bring a suit against the council of any city or town, or the chapter of any church, he cannot institute it against all the members individually, but against their agent or attorney in fact, appointed to represent them ; otherwise all the proceedings would be void. For though the members are jointly, they are not individually bound to pay the debts, or to perform the obligations contracted by the council, chapter or convent, in their corporate capacity. And in like manner, a debt due by some only of the members of a corporation, cannot be sued for by them all jointly, but by those only to whom the right of action belongs. (2)

LAW 14.

How suits may be brought against persons not mentioned in the preceding laws.

In the preceding laws we have designated all those persons who could not be sued except under certain restrictions ; and have pointed out all the formalities to be observed, in order that plaintiffs may know how to proceed, so as not to endanger their rights : for unless those formalities are observed, the persons therein mentioned cannot be legally sued. But against

(1) C. art. 8. p. 4. & art. 31 & 33. p. 82 & 84.

(2) C. art. 12. p. 88.

all other persons, any action whatever may be brought, either against them directly, their attorney, (*personero*) or their heirs.

LAW 15.

Of what the plaintiff should inform himself when he is about to bring a suit.

The plaintiff must not only consider the person against whom he intends to bring a suit, as we have said in the preceding laws, but likewise the thing which is the object of that suit. First, whether it be moveable or immoveable : next, whether he will sue for the property and possession of the thing, or the possession only : or whether he claims damages for any wrong or injury sustained in his person or property ; or any thing else which the defendant had promised to give or to do. For if he intends to sue for a thing that is moveable and living, as a slave, he must mention its name, and whether it be male or female, young or old, a negro or white man : if for a horse, mule, or other animal, he must describe its qualities and color : if for a piece of gold, silver, or any like thing usually weighed, he must mention its weight : if for a piece of work executed by art, as a vase or porringer of silver, he must likewise mention its weight : if for money, he must set forth the kind of metal, and the sum : if for wheat, barley, wine or oil, or any like thing usually measured, he ought to set forth their nature and measure : if for unwrought silk, wool or flax, he must set forth its weight : if for cloth not yet cut or sewed, he must set forth its color and measure ; as whether a whole or half piece, or a certain number of ells : and so if it were a piece of silk, muslin or linen. And

when the plaintiff claims any sort of stuffs which are cut or sewed in any manner whatever, he must set forth their name, quantity and color. But if he sues for a box or chest, locked or sealed, which he had given any person to keep for him, he will not be obliged to set forth its contents particularly : Nevertheless he may do so if he chose, and the defendant cannot excuse himself from answering, under pretence that he does not know what it contains. And we say the same rule must be observed with respect to all other things similar to those mentioned in the present law. Yet, if the plaintiff sue for a thing usually weighed or measured, and declare under oath that he does not recollect, with certainty, either its weight or measure, the judge may nevertheless receive his petition, and render judgment in his favor, for so much as he shall prove at the trial, and no more. (1)

LAW 16.

That things moveable, for which there exists a suit, ought to be produced in court.

A moveable thing, for which a suit is brought, ought to be produced in court ; otherwise the plaintiff might not be able to establish his demand, or bring forward the necessary proof to support it. Therefore, we say that the defendant is bound to produce to the judge the thing for which he is sued, in presence of the plaintiff or his attorney (*personero*,) whether the plaintiff claimed it as his own, under a pledge, or set up some other right to it. We also say, that where the plaintiff complains that the slave or servant of the de-

(1) *R. l. 4. tit. 2. b. 4.*

fendant, had stolen any thing from him, or had done him any other wrong or injury, and that he did not know the name of such slave or servant, and could not recognise him, without seeing him, he may require the defendant to produce the whole of his family, that he may identify him. And so if a man had left a legacy by will, giving to the legatee the right of selecting and taking any one from among his slaves, or horses, or any other thing whatever of his estate, that he might prefer; the legatee may require the person in possession of such objects, to produce them, that he may choose accordingly: for all such and other moveable things which the plaintiff claims, and cannot identify unless they were present, ought to be brought into court. And so where a man had set the precious stone of another person in gold belonging to himself, under the belief that the stone was his own, or that he had a right to it: or where a man puts the wheel of another's carriage to his own; or uses plank belonging to another person in building his ship; or the cloth of another in making his coat; or had added any thing of a moveable nature not his own, to something that belonged to him, or had used it in any other similar way whatever. In all these cases, the defendant, if required to do so, must separate the things so joined with another, and produce it in court. But if a man had employed in the construction of his house, any posts or other timbers, or stone or lime belonging to another person, he will not be obliged to separate them to exhibit to his adversary in court. The ancient sages have so determined, because the houses and other buildings erected in towns, are not only useful to their own-

ners, but embellish the place where they are situated, which would, if they were taken to pieces, appear to be in a state of ruin. Yet he who employs the materials of another person in building his house, ought to pay the owner of them double their value, provided he had acted in good faith, believing they did not belong to any body else, or that the owner would not have objected. For if he acted in bad faith, he or his heirs will be bound to pay the owner the amount of damages he had sustained by being deprived of his materials; which amount shall be estimated by the owner's oath, and the appraisement of the judge. (1)

LAW 17.

What other things ought to be produced in Court.

If the plaintiff allege that he is appointed heir or legatee by a will or codicil which is in the possession of the defendant, and require him to produce it in court, the defendant will be obliged to produce it accordingly. And so where there are several co-heirs to the same estate, and one of them take possession of the papers or will of the deceased, and the others require him to produce them, in order to verify any thing: in all these and the like cases, the defendant, if he have the will or papers, will be obliged to exhibit them. And so the seller must exhibit to the buyer, the title papers and guaranty, by which he held the thing sold, to enable him to defend himself against a suit therefor, or to remove any doubts that may arise concerning its limits and boundaries. The same rule is to be observed, wherever one man obliges himself to guaranty any

(1) *C. art. 11. p. 104.*

thing to another. And likewise where a person enfranchises his slave he must give him the deed of his enfranchisement, that he may produce it in court, as occasion requires. And so where a man obligates himself in writing, to pay money, that writing must be delivered to him, as soon as he had paid the money. So where one of the partners had the common account books, he would be obliged to shew them to the other partners. So the attorney must deliver to his constituent, the papers and documents of the cause entrusted to him : the guardian to his ward, the papers concerning his estate : and the steward to his lord the accounts and documents relating to his affairs. In these, and all similar cases, any person detaining papers and writings, is bound to bring them into court, if so required by the owner of them, or other person having a just right to see them. In the same manner, notaries public are obliged to exhibit their registers to the parties to the acts contained in them, as we have shewn in the title concerning notaries. For they are, in a manner, servants, whose duty is to execute instruments of writing under the orders of others, and faithfully to preserve them, to be exhibited, when occasion may require.

LAW 18.

What ought in justice to be done, where the thing claimed of the defendant, has been lost without his fault.

Where a man has in his possession a bird, beast or slave and they escape from him, without fraud or deceit on his part : or where he is ignorant that any one intends to sue him for them, and he send them away so remote that he cannot produce them in court so soon

as required : in these and similar cases he will not be bound to produce them. If, however, the defendant declare, that the thing belonged to him, although not in his possession, he ought then to give security to produce it in court whenever he shall regain possession of it. But if he declare that he neither has the thing, nor wishes to recover it, or to defend it, if he had possession of it, he will not in that case be any longer responsible, or obliged to give security for it, provided he had not dispossessed himself of it, either by fraud or deceit.

LAW 19.

What penalty they deserve who destroy or convey away a moveable thing for which a suit exists.

Men sometimes practise fraud, in order to avoid bringing into court the moveable things for which they are sued. As where the plaintiff demands that the slave, horse, or other animal which he claims, may be produced ; and to avoid doing so, the defendant convey it away, or destroy it : or where the suit is brought for wine, oil or any other fluid, and he pour it out, or sell it : or for a piece of metal, or any thing artificially made, and he melt it down, or destroy it, in such manner that it lose its original form. In all such cases, he will be obliged to pay the plaintiff the amount of the damages which the latter shall swear he had received, by the fraudulent conveying away or destruction of the thing, so that it could not be produced in court. But if the defendant do produce the thing in court, and it be deteriorated or damaged, though not entirely changed in its substance ; and the plaintiff prove it to be his property, or shew some other right to its pos-

session, the defendant will be obliged to deliver it up, and moreover to pay the amount of the damage which the plaintiff had sustained by his fault or fraud.

LAW 20.

What the law requires where the defendant fails to produce the thing for which he is sued.

It may sometimes happen that the defendant cannot produce in court the thing in dispute when thereto required. Yet if the plaintiff insists on its production, and proceeds in the cause, the defendant may afterwards produce it at the time judgment is about to be rendered: and as doubts might arise in such cases, we say that the defendant ought to exhibit the thing for which he is sued, at any time whenever he can. But if he could have exhibited it at the commencement of the suit, and did not; alledging that it was not his duty to do so as the defendant had no right to it; and the judge, when he is ready to render his judgment, order him to exhibit, or deliver it to the defendant, at a time when it was not in his power, the thing being lost; or having fled or died, if it were a living thing: in that case, if the defendant had held the thing in good faith, and had lost possession of it, in either of these ways, he will not be obliged to exhibit it or to pay any thing therefor. But if he had contended for it, knowing he had no right to it, we say he acts in bad faith; for he ought to have produced it, before it was lost or destroyed, and will therefore be obliged to pay the plaintiff its value as fixed by his oath and the appraisement of the judge. But if the defendant be in possession of the thing and

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the judge order him to produce it and he refuse, the judge may then command the alguazil, or any other officer of the place to take it by force and bring it into court.

LAW 21.

In what place the defendant is obliged to exhibit or deliver the thing for which he is sued.

When a judgment is rendered at the instance of the plaintiff, requiring the defendant to produce the thing for which he is sued, at the place where the suit is instituted, he will be obliged to do it accordingly, if the thing be there. But if it happen to be elsewhere, and the plaintiff require the defendant to bring it to the place where the parties are at issue, the judge ought to order the defendant to produce it accordingly : provided, however, that the risk and costs of transportation be on account of the plaintiff ; unless it were a slave or an animal, for then the defendant would be bound to nourish and feed it. But if the slave were a tradesman whose labor supported him, then he would be maintained at the charge of the plaintiff who had interrupted him in his business, by causing him to be transported from one place to another. These provisions of the law, apply where the defendant claimed the thing for which he was sued in good faith, by virtue of a just title, and had not fraudulently conveyed it away to another place. But if he had conveyed it away, in order to conceal it, he would then incur all the expenses and risk of the transportation necessary for its delivery or exhibition.

LAW 22.

If the defendant had conveyed away the thing for which he is sued, he ought to make it known when he is required to produce it in court.

As the defendant may by delaying to produce the thing in dispute, prolong the suit for so long a time, as to acquire it by prescription, or to enable another person to acquire it, to whom he had given or sold it, as we have observed in the laws which treat of that matter : we therefore say that he shall be obliged to produce the thing in the same state, it was at the commencement of the suit, if it be in his possession ; and if he had alienated it, he ought immediately to make known the same, in order that the plaintiff may claim it, without endangering his title ; but if he does not do so, and offers afterwards to produce the thing at a time when the alienee had acquired it by prescription, it will be as much a contempt of the court, as if he had refused to produce it when thereto required, while it was in his power : and the judge may thereupon proceed against him, if necessary, in the manner prescribed in the third preceding law. But if he does not avail himself of such plea of prescription and answers as though the thing were in the same state it was at the commencement of the cause ; the judge may proceed, without punishing him, as for exhibiting it, after he had acquired it by prescription. And this rule applies not only to the thing itself, which ought to be exhibited in court, but also to the rents and fruits which it has yielded, since the commencement of the suit. But if at the time the suit was instituted, the plaintiff had already lost by prescription, the thing which he required

should be produced in court, the defendant will not then be obliged to produce it, as the plaintiff had lost all right to it.

LAW 23.

What the law requires, where the defendant refuses to produce in court, the moveable thing for which he is sued.

It may happen that a refusal on the part of the defendant, to produce the moveable thing in court, may cause greater damage to the plaintiff than the thing itself was worth. As where the plaintiff requires that the slave which he claims may be brought into court, to enable him to obtain any thing which had been bequeathed or given to that slave, and the defendant refuse, when ordered by the judge : if the plaintiff lose the inheritance by such refusal, or any other right which he could have preserved by means of the slave ; in such and the like cases, the defendant will be bound not only to pay the plaintiff the value of the slave, but likewise all the damages which he shall swear, under the appraisement of the judge, he had sustained thereby. We also say that where a man, by will, bequeaths one of his slaves to be selected within a limited time, and the legatee require that all the slaves of the deceased be presented to him, in order that he may make his selection accordingly, and the heir refuse to produce them, until the limited time elapse, in which he was to have made his selection ; the heir, in that case, will be responsible for all the damages he may have caused to the legatee by such refusal. This rule applies not only to slaves, but to every thing else bequeathed in the manner stated above.

LAW 24.

What is the law where the judge decides in favor of the defendant, although he has the thing in his possession.

The judge sometimes decides for the defendant because the moveable thing in dispute, is not in his possession or because he has lost it, without his own fault or fraud. But if he afterwards get possession of it, he cannot then plead in bar, a former judgment rendered in his favor, at a time when it was not in his power, to produce the thing: for whenever he does get possession of it, no matter in what manner, he will be bound to produce it, as though no former suit had existed; it being understood that the first judgment was given in his favor, solely because the thing was not in his possession. If, however, the judge had decided in favor of the defendant, because the plaintiff had no title to the thing, then the defendant may forever plead that judgment in bar; that it excuses him from producing the thing in court or from answering therefor, to any suit brought by the plaintiff, or any person claiming under him.

LAW 25.

That the plaintiff ought to describe with certainty the thing he claims.

Where the plaintiff claims a field, a vineyard, a house, or any thing else of an immoveable nature, he must particularly set forth the place in which it is, its limits and boundaries: and so if he claimed it by virtue of a mortgage, when it was not in his possession, or under any other title whatever. He must above all, when he sues for any thing, whether moveable or immovea-

ble, be careful to set forth under what quality he claims it; whether as purchaser, donee or otherwise : and this for two reasons. The first is, that having clearly set forth the nature of his title, he may then apply his proof with more propriety ; and the judgment thereon can be then rendered with more certainty. The second, that if he can not establish the particular title under which he claims the thing, he may bring another suit for it afterwards, under a different title, to which the former judgment will be no bar, as it can apply to the first case only : provided, however, that a second suit cannot be instituted upon a different title until the first be finally decided. But if the plaintiff claim the thing generally without alledging any particular title, and fail in his proof, and judgment go against him, he can never afterwards renew his suit for the same thing : for by setting up a general claim he thereby included all others he may have had to it. Yet if he alledge and establish a new title to the thing by which he had acquired it, since the judgment was rendered against him ; as that it had been given to him, or that he had bought it, or that he had since acquired it in any other manner from the person having the right to give or sell it : in such case as this, he may institute his suit anew. (1.)

LAW 26.

What things may be sued for in general terms without specifying them particularly.

The plaintiff, as we have said in the preceding law, must particularly set forth the things for which he sues ; otherwise the defendant could not answer, nor the

judge pronounce with certainty. Yet there are things which may be described in general terms when they admit of no other description, and when by not specifying them particularly, no great injury is done to the defendant who can from such general description understand with sufficient certainty to answer to the suit. As where he sues for the whole or a part of an estate to which he is entitled by inheritance, it will suffice to alledge that he claims the estate of such a one as his heir, without specifying particularly each article of property of which it consists. And so it would be, where the defendant were called upon to render an account of the estate of a minor, or other person who had been under his care; or to account for the partnership effects or the administration of any other trust, or for the profits, losses or damages arising from the same. And so it would be where the plaintiff claimed a villa, castle, hamlet, or other specific place; it would suffice to set it forth by name, with all its limits and dependencies, without designating each particular thing that appertained to it. And what we here prescribe applies to every other similar case. (1.)

LAW 27.

What is property and possession, the difference between them and how they are to be respectively sued for.

Property and possession are two words of very different import. Property signifies the right of dominion which a man has to a thing; possession, the detention only of that thing. And as the right of property

(1) *R. l. 4. tit. 2. b. 4.*

is more difficult to prove than the right of possession; the ancient sages have said that it would be better for the plaintiff to bring his suit for the possession if he can shew his right to it, than for the property. When, therefore, any one sues for the possession of a thing, he must describe it in the same manner we have said in the preceding law he ought to, when he claims it as his property. And if he is unable to establish his claim for the possession, he may abandon the suit, and afterwards institute another for the property itself. We moreover say that if the plaintiff be expelled or evicted from the possession of his property, he may, in the same petition, claim both the possession and property of the person who has it. And where he demands to be put into the possession of a thing, and the person who has it, or any body else, resist his demand by claiming it as their own, or in virtue of some other right; in that case the claim for possession must be determined before that of the right of property: unless the person claiming the property be ready to establish his title immediately by satisfactory proof; for then his claim must be heard and determined before that of him who demanded the possession only. And this the ancient sages thought just; for notwithstanding the plaintiff first required to be heard on his claim of possession, he could not prevail, though he were to prove it, as the owner was ready to establish his title by satisfactory proof without further procrastination of the cause; and if he establish it, he ought then to be put into possession of the thing, and thereby the claim of the other would be wholly extinguished. (1.)

(1) *R. l. 4. tit. 2 b. 4.*

LAW 28.

What advantages arise from the possession of a thing.

Great advantage arises from being in possession of a thing whether held by a just title or not. For notwithstanding the plaintiff may alledge it to be his, yet until he prove his title, it will always remain in the possession of him who has it, although he shew no title by which he holds it. (1.)

LAW 29.

What he ought to do, who is sued for a thing which he detains in his own name, or in the name of another.

He who wishes to sue for the possession or property of a thing, must bring his action against the person who has it in possession ; and the latter ought to defend the suit, unless he held it, in the name of another, and dared not, or was not willing to undertake its defence ; for then he ought to make known to the judge, the name of the person for whom he held it, and ask for time to inform him of the suit, that he might come forward and make his defence ; and the judge ought to grant his request : and if the person, so named, does not appear within the limited time, or send some one else to answer for him, then the judge may grant three other terms of delay such as he shall think fit. And if after all he should not come, nor send any one in his stead, the judge ought to take the plaintiff's oath, that he had not instituted the suit with evil intentions or motives, and thereupon put him in

(1) *R. l. 14. tit. 8. b. 2.*

the possession of the thing he claimed. And though the person in whose favor the delay had been granted, should afterwards appear, he cannot recover the possession of the thing which had been taken from him ; yet he would retain unimpaired his right to sue for the property itself. (1.)

LAW 30.

That a man forcibly deprived of his property may reclaim it either of the person who dispossessed him, or of him who has it in possession.

If a man be forcibly deprived of a thing, he has his election to bring his action for it either against him who is in possession, or the person who deprived him of it ; or against him by whose orders he was deprived of it, or any body else who knowingly received it of a person who had obtained it by force. We likewise say that where a man, under the apprehension of being sued for any thing, alienate it to a person more powerful than himself, or who is amenable to a different jurisdiction, in order to increase the difficulty of suing for it ; the plaintiff may in that case, bring his action against the person in possession ; and moreover against him who had so alienated it, for the amount of the damages thereby sustained. But if he chose not to bring his action against the possessor, he may sue the person who had alienated it, for the value of the thing, which being once recovered, he will no longer have any recourse against the possessor. (2)

(1) *R. ll. 1. & 2. tit. 11 b. 4. Auto. 2. tit. 24. b. 2.*

(2) *R. l. 1. tit. 13. b. 4.*

LAW 31.

In a suit for reparation for an injury done, the plaintiff must set forth the amount of damages he had suffered, and the nature of the injury he had received.

When a man institutes a suit to obtain reparation for any injury, dishonor or damage done himself or property, or done to another person in whose name he has a right to demand reparation : if the dishonor be caused by words, as by defamation ; or if the defendant had advised a third person or his slave to do any act or to use expressions by which any injury or dishonor might be sustained by any person of the plaintiff's family : the plaintiff must, in such case, clearly set forth the defamatory words, or the evil advice that had been so given, and likewise the amount of the reparation he claimed, in order that the judge may know if the expressions were such as to cause any injury, and if he were entitled to the damages he alleges he had sustained. And if the dishonor or damage had been done to his person ; as by striking, wounding or imprisoning him : or any thing had been taken from him by force, as his cattle or herds ; or his trees cut down, or any other injury had been done him ; we say that in each of these cases he ought to state the facts just as they occurred, and then the judge will entertain his suit ; and if he does not so state them, the defendant will not be obliged to answer, as the cause of action is not clearly set forth ; nor can the judge pronounce thereupon with sufficient certainty.

(1)

(1) *R. l. 4. tit. 2. b 4.*

LAW 32.

Before what judge the plaintiff must bring his suit, in order to compel the defendant to answer.

We shall here shew before what judge the plaintiff must bring his suit, as it is a matter he must well understand before he commences it. We, therefore say, that the ancient sages, who established the laws, thought it just that the plaintiff should bring his suit before that judge who had jurisdiction over the defendant, as he would not be bound to answer before any other, except in those cases herein enumerated. The first, where the defendant is a native of the place where the suit is brought ; for though not domiciliated there, he may be compelled to answer, if found there, on account of its being the place of his nativity (*naturaleza.*) The second relates to the emancipation of slaves ; for the freedman is bound to answer before the judge of the place where his former master resides or was born. The third relates to married women ; for although the wife be born in another place, she must answer before the judge having jurisdiction over her husband, The fourth relates to the military (*caualleria*) (1) ; for a soldier who receives pay, or a bounty from his king, must be sued in the place where he resides, on account of his service. The fifth is where the defendant has inherited an estate, concerning which the suit is instituted. The sixth is where the defendant, or the per-

(1) Don Juan Sala observes, that by the word *Caualleria*, as used in the laws of the Partidas, is understood soldiers or military men in actual service. Sala *Ilustración del derecho real de España*, vol. 1. p. 141.

son whose property he inherited, had promised to do something, or perform some contract in the place where the judge before whom the suit is brought, exercises jurisdiction ; or where the contract or promise had been entered into elsewhere, but under obligation to perform it in the place where the suit is brought ; for though the defendant were not domiciliated in that place, yet he would be bound to answer there, for the reasons before mentioned. The seventh is where the defendant had resided ten years in the place where the suit is instituted. The eighth is where the defendant has the most considerable portion of his estate in that place, though he may not have resided there ten years. The ninth is where the defendant voluntarily answers before a judge who has no jurisdiction over him ; he will then be obliged to go on with the proceedings, in the same manner as if he resided within the jurisdiction of the judge. The tenth is where the defendant had committed some crime or offence, which gave rise to a suit ; he will then be obliged to answer thereto, in the place where he committed it, though he may have been born or were domiciliated elsewhere. The eleventh is where the defendant is a transient person, or a vagrant, who does not abide permanently in any place ; he will be obliged to answer wherever he may be found. But if he can give security for his appearance in court, at any one of three places pointed out by the plaintiff ; that is, at the usual place of his residence ; or at the place where the contract was made, or where he had promised to perform it ; then the judge who has no jurisdiction over him, cannot compel him to answer. If, however, he be unwilling, or unable to give such security, he cannot decline the jurisdiction of the judge

of the place where he happens to be found. The twelfth is where the plaintiff brings a suit for a slave, or animal, or other moveable thing, which he claims as his property ; the defendant will be obliged to answer in the place where he is found in possession of the thing sued for, though he may reside elsewhere. Yet if he were an unsuspected person, and were willing to give security to produce the object in dispute, at such time as the judge may fix, he ought to be permitted to retain it in possession. But if he be unable to give such security the thing must be placed under the care of a guardian, and the judge ought to proceed to judgment with all possible dispatch, that the defendant may not be long delayed. And if he were suspected of having obtained the thing by theft or robbery, he may be imprisoned until it can be known whether he had any right to it or not, or whether he were justly suspected. The thirteenth is where the defendant himself brings an action against the plaintiff : for as soon as he had answered to the first suit, the plaintiff will be obliged to answer in turn to the second, and he cannot excuse himself by alledging that he is not under the jurisdiction of the judge before whom the action is brought. For the ancient sages thought it but just, that the plaintiff should be obliged to answer before the same judge before whom he chose to bring his own action. The fourteenth is where the defendant had been guardian of the estate of a minor, an idiot, or a lunatic, or had been steward to some lord, or the guardian of the public monies or mines, or keeper of the forests or pasture grounds : in all these and similar cases, he will be bound to answer if sued, and to render an account of his administration in those

places respectively, where he had exercised the duties of his office. (1)

LAW 33.

During what time it is not permitted to bring a suit.

(Not in force.)

LAW 34.

Upon what days it is forbidden to institute suits through respect to God and the Saints.

We likewise ordain, that Sunday shall be kept holy, in honor of the Deity, and that no suit shall be instituted on that day. (2)

(No other part of this law is in force.)

LAW 35.

In what cases suits may be instituted during the days mentioned above.

The judge may appoint guardians to minors, or remove them from office when they are suspected of improper conduct, during the holidays mentioned in the preceding law ; and he may also hear their reasons when they wish to excuse themselves from the guardianship. He may likewise take cognizance of suits brought for subsistence by minors against their guardians, or by their guardians against other persons, in the name of the minors, or by the father against his son, or by the son against his father, or by the freed man against his former master, or by the latter against

(1) *R. ll. 7 & 8. tit. 3. b. 4.*

(2) *R. l. 4. tit. 1. b. 1.*

the freed man whenever the defendant is able to furnish such subsistence. Or of a suit, brought by a widow, left pregnant by her husband, praying to be put into possession of part of his estate, on account of the unborn child ; or of a question concerning the age of any one, whether he were a minor or not ; or of a suit concerning liberty or slavery ; or concerning a will, the opening and exhibiting of which is prayed for by a person interested therein : or where the creditor prays the judge to be put into the possession, as guardian of the estate of his deceased debtor who had died without heirs and left his property abandoned ; or that a guardian should be appointed thereto, that it might not be lost or damaged. For in any of these cases, suits may be brought on a holy-day, being considered as a work of piety, and what is done thereon will be valid ; and so all causes which relate to the public good, or peace, or the establishment of troops to guard the country, or to the punishment of traitors or high-way robbers who infest the public roads, may be heard and determined on that day : for as the ancient sages have said, he is the friend of God who destroys the enemy of God, no matter when. And moreover the emperors and other wise law-givers have, for two reasons, considered it right that men should sow and gather the fruits of the earth on holy-days, when necessity required it. The first because such labors contribute to the public good : The second, because it may happen that such days are more favorable than any other for performing the labors necessary to make the earth bring forth fruits ; and if not performed then, they may afterwards become impracticable.

LAW 36.

Of the holy-days which may be established by the emperors and kings.—(Not in force.)

LAW 37.

*Of the holy-days established for the public good.
(Not in force.)*

LAW 38.

On what holy-days the plaintiff may commence his suit with consent of the defendant.—(Not in force.)

LAW 39.

That the plaintiff should take care to have sufficient proof before he commenced his suit.

The plaintiff ought to take great care that he has the necessary proof to sustain his action before he commences it ; for he is always bound to prove what he alledges, if denied by the defendant, either by witnesses, instruments of writing, or by any other evidence worthy of belief. And if he be not certain of the sufficiency of his proof before he begins, that which he thought would be to his advantage, will turn to his prejudice and confusion : for he will then have the defendant's costs to pay, and will moreover be regarded as inconsiderate, for having undertaken a cause, without previously ascertaining whether he had the necessary proof to sustain it. (1.)

LAW 40.

In what manner the plaintiff ought to bring his suit.

By *libellus* in latin is meant a petition in writing. This is one of the two ways in which a suit may be

(1) *R. l. 14. tit. 8. b. 2.*
vol. 1.

instituted ; the other is by words. But the most certain is that which is reduced to writing, as it cannot be changed or denied as the other may be. In whatever manner the suit is brought, however, that it may be legally done, five things must be carefully set forth in the petition. The first is the name of the judge before whom the suit is brought : the second, the name of the plaintiff : the third, the name of the defendant : the fourth, the thing, or quantity, or amount, or the fact which is the object of the suit : the fifth the cause of action. For all these things being set forth in the petition, the defendant will know with certainty what to answer, the plaintiff what to prove, and the judge how to inform himself of the whole matter, and to proceed in the cause, according to law. And though learned men may well understand what is here laid down, yet as there are many who cannot, we will explain, with more certainty, how a suit is to be commenced, either in writing, or verbally. When, therefore, the plaintiff appears before the judge, he ought to say : “ before you, Don such a one, judge of such a place, I such a one, complain of such a one, that he owes me so many maravedis which I lent him, wherefore I pray you to condemn him to pay me.” In this manner all suits are to be brought, changing the expressions, according to the nature of the thing sued for.

LAW 41.

What things can be sued for without a petition in writing.

The ancient sages have determined that every suit for a sum above ten maravedis, or for any thing of

greater value than that sum, should be in writing; but below that sum, the plaintiff is not obliged to make his demand in writing, unless he choose; for it will suffice for him to declare verbally before the judge, in presence of the defendant, what he demands, and the nature of his claim, as we have above said. And this provision was adopted in order that suits of small value, might be decided with more dispatch, and less expense. And we moreover say, that if the defendant own no immoveable property in the country, (*non es raygado en la tierra,*) the plaintiff may require him to give security to appear and abide by the judgment of the court, (*que este a derecho;*) and the defendant will be obliged to give it accordingly, if it be in his power; and if not, he shall then take an oath that he will not depart from the jurisdiction of the court, until the final determination of the cause. And as soon as the judge shall have heard the plaintiff's demand, he must make it known to the defendant, and fix a time within which he may take advice how to answer.

LAW 42.

In how many ways a man may sue for more than he has a right to claim.

The plaintiff sometimes brings his action for more than he has a right to claim; an error which he ought carefully to avoid, for it may do him much harm, and no good. This may happen in four ways: the first is when he claims in his petition more than is due; as where one owed him ten maravedis, and he claimed twenty, or any the like thing. The second, where he brings his action, in a manner different from what he had a right to do; as if one of two things had been

promised him at the choice of the debtor, and he were to designate in his petition which of them should be given him. This would be unjust, as it would tend to deprive the other of the power of giving which of them he pleased. The third, when he brings his action too soon ; as where he sues for a debt not yet due. The fourth, when he claims to be paid, in a place where the defendant was not bound to pay ; as when a place of payment had been agreed upon, and he brings suit to be paid in another. Of these four ways we shall fully speak hereafter.

LAW 43.

What injury the plaintiff sustains by suing for more than is due.

The plaintiff sometimes sues for more than is due, so that afterwards he cannot prove the whole amount he claims. And as some have pretended that in such cases he ought wholly to loose his cause ; we therefore say, according to what is observed by the ancient lawgivers, that although the plaintiff does not prove all he claims, yet he may sustain his action for as much as he does prove, and for so much the judge can render judgment against the defendant, and discharge him of that which is not proved. Yet, if the defendant has incurred any costs on account of the excessive demand, the plaintiff will be obliged to pay such costs.

LAW 44.

What penalty he incurs, who fraudulently induces his debtor to obligate himself for more than he owes.

Men sometimes fraudulently induce their debtors to obligate themselves, either in writing, or before witnesses, for more than they owe, and then sue them for the amount in which they so bound themselves.

But as every thing done in fraud is void in law, we therefore say, that if the defendant can prove the fraud, the plaintiff shall lose not only the debt really due, but the additional sum stipulated either in writing, or verbally, before witnesses : and this for two reasons. The first, on account of the fraud which he practised upon the defendant : and the second, because with a knowledge of the fraud, he had presumed to institute a suit, hoping to deceive the judge, by the writing entered into between the parties, or by the proof he had against his debtor. Yet if the plaintiff, before the trial of the cause, refuse to take advantage of the fraud he had committed, and content himself with claiming the sum really due, he may do it, and then he will incur no penalty whatever.

LAW 45.

What penalty the plaintiff incurs who sues for the payment of a debt in a place where it was not due.

Men sometimes sue for a debt, or for the performance of an obligation, at other times and places than those agreed upon. In such case, we say that the plaintiff shall pay the defendant three times the amount of the loss and damage he had thereby sustained. And so, where the plaintiff brings his action, in a manner different from what he ought to have done ; as has been said above, where he expressly sues for one of two things, without mentioning the other, notwithstanding it had been left to the choice of the debtor to give which he pleased. And we moreover say, that the plaintiff ought not to be heard, when he sues for a debt before the time had arrived at which the debtor was bound to pay. And the judge ought, in such case, to pro-

long, by way of penalty, the period for the payment of the debt, by adding the same length of time thereto, as the plaintiff had anticipated in his suit ; and to condemn him moreover to pay all the costs and charges the defendant had sustained on that account.

LAW 46.

That no person can be compelled to sue, except in certain cases.

No person can be compelled, against his will, to sue another, unless in certain particular cases, wherein the judge may, by law, oblige him to do it. As where a man publicly says that another is his slave, or defames him in presence of other persons. In these, and the like cases, he who is defamed, may petition the judge of the place, to oblige the defamer to bring a suit, and prove what he has said, or to retract, or to make such reparation as the judge shall deem just. And if he be contumacious, and refuse to institute his suit in obedience to the order of the judge, we say that the party agrieved shall be forever absolved from the charge made against him, so that neither the person defaming him, nor any one else for him, can thereafter sue him on that account. And if such defamer afterwards repeat the same defamatory language against the same person, the judge ought to punish him, so that by his example others may be deterred from unjustly speaking ill of any one.

LAW 47.

That the judge can oblige those who have claims against persons going on a journey to bring their suits.

Men sometimes, through envy or malevolence, lay snares to entrap one another ; as happens to mer-

chants and other persons, about to enter upon journeys by land or sea. For as soon as it is known their goods and effects are prepared for their departure, suits are maliciously brought against them, in order to prevent their setting out at the appointed time. We therefore say, that the judge ought not to suffer such imposition and fraud when he discovers it. And that the evil may be prevented, we ordain, that any merchant, or other person, who has reason to fear he will be sued, may apply to the judge to order him who intends to bring the suit, to institute it immediately, and not to delay it until the moment of their departure; and the judge ought to order him accordingly. And if he will not then bring it, he cannot afterwards, until the defendant shall return from his journey.

TITLES,

Of the Roman and Spanish Laws which relate to that of
LAS SIETE PARTIDAS, on Defendants.

Digest, lib. 2. tit. 13. l. 1. § 1. & ll. 3. 9 & 10. *De Edendo.*

Digest, lib. 42. tit. 1. l. 38. - - - - - *De re Judicata.*

Digest, lib. 50. tit. 17. ll. 33. & 125. *De diversis regulis.
 juris antiqui.*

Institutes, lib. 4. tit. 12. § 2. *De perpetuis et temporalibus.
 actionibus.*

Code, lib. 2. tit. 1. ll. 1. 4. 5. 6 & 8. - - - - - *De Edendo.*

Code, lib. 3. tit. 1. l. 13 § 3. - - - - - *De Judiciis.*

Code, lib. 3. tit. 11. l. 3. - - - - - *De Dilationibus.*

Code, lib. 4. tit. 32. ll. 38. &c. - - - - - *De usuris.*

Code, lib. 7. tit. 54. ll. 1 & 3. - - - *De usuris rei judicatæ.*

Leyes del Estilo, l. 11. - - - - -

OF DEFENDANTS.

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TITLE III.

OF DEFENDANTS,

AND THE PRECAUTIONS THEY OUGHT TO TAKE.

LAW 1.

That the defendant must consider well who brings the suit, before he answers.

The defendant must consider well who brings the suit, before he answers to it. He must therefore first inquire of the plaintiff, whether he brings it on his own account, or in the name of another person. And if he says he brings it in the name of another, the defendant will not be obliged to answer, unless the plaintiff shew his authority, by exhibiting a legal power of attorney, (*carta de personeria* ;) or will give security, that all he does in the suit, shall be approved by the person in whose name he brings it ; as is ordained in the laws of this book, which treat of attornies (*personeros*.) The defendant ought furthermore to ascertain whether he who brought the suit, had instituted it in the name of an orphan ; for then he ought not to answer until the other party had produced documents, shewing that the orphan for whom he acted, was under his guardianship; which document ought to be filed among the records, that the power of the guardian may not be afterwards disputed ; in this way, all the proceedings had in the cause, will forever remain valid. And if the person instituting the suit, declare that he brought it on his own account, and not for another, then the defen-

dant ought to ascertain whether the plaintiff had a right to appear in court, and if he had not, the defendant will not be obliged to answer. As if the plaintiff were a minor, under twenty-five years of age, and had brought a suit, without the assistance of his tutor, or curator : or if he were a slave, or one of those persons mentioned in the preceding title, who had no right to appear for themselves, in courts of justice.

LAW 2.

What precaution the defendant ought to take, where he is sued for a thing which the plaintiff claims as his property.

Where the plaintiff sues for any thing which he claims as his property, the defendant ought to take care not to engage in the suit, unless he were in possession of the thing. For if he answer that he has it in his possession, when he had it not ; and the plaintiff believing it to be true, proceed in the cause and prove his claim : the defendant will be obliged, as a punishment for the deception, to pay the plaintiff as much as he shall swear the thing was worth : the value thereof being first fixed by the judge. But if the plaintiff, well knowing the deception practised by the defendant, in saying he had the thing in his possession, when he had it not, proceed nevertheless, to prove his claim, and the defendant afterwards, and before final judgment, desire to retract what he had said, declaring that he has not then, nor had the thing in possession at the time he said he had ; he may be permitted to make such retraction, and the plaintiff cannot avail himself of any proof he may have made, inasmuch as he proceeded maliciously in the cause, to his own prejudice, well

knowing that the defendant had not the thing in possession at the time he said he had.

LAW 3.

What penalty the defendant incurs, who denies in court that he has the thing in his possession, when he has it.

If the defendant deny in court, that he has the thing in his possession, for which he is sued, and it should be afterwards proved that he had it; he will be obliged to deliver it up to the plaintiff, though he were not to shew his right to it. Yet the defendant may afterwards bring an action for the property of the thing, and if he can prove his claim, he may be again put in possession of it; and if he cannot, it will remain in the possession of the plaintiff. The defendant ought moreover to consider whether the thing for which he is sued, be moveable, and whether the plaintiff claimed both the possession and property of it, or the property only: or whether he claimed a debt, or reparation for a wrong, injury, or dishonor done him, in order that he may know how to answer, and whether he will be able to proceed in the suit and defend himself or not. For in all these things, it is as necessary that the defendant should attend particularly to what is demanded of him, as that the plaintiff should be careful what he demands, according to what we have before said. (1)

LAW 4.

That the defendant is not bound to answer before any other judge than where he has his domicil, except in certain cases.

The defendant ought not to answer before any other than the judge of the place where he usually re-

(1) *R. l. 14. tit. 8. b. 2.*

sides, unless in those cases before mentioned under that head, in the laws which treat of plaintiffs. Nevertheless, he will be obliged to answer to the king in every suit, if he be found in his court. And he can not excuse himself therefrom, by saying that the action had never been brought before the judge of his domicil, or by any similar pretence. And this because the king's court is common to all, and no one can decline its jurisdiction. Yet if the defendant had come to court in order to escort his lord whom he was bound to attend, or in obedience to his command, or to that of his city council, or to serve as a witness in any cause in which he had been summoned, or to prosecute an appeal, or had been called there by the king on account of any business he had with him ; he would not be obliged to answer to any suit brought against him there, until he had first returned to his home. But though he may, in such cases, decline answering, he ought, nevertheless, to promise the king that he will answer to any suit brought against him before the judge of the place of his residence. But for whichsoever of the above causes, he may have come to the king's court, if when there, he should buy or sell, or enter into contracts, or do any wrong, or violence, or injury, or commit any offence ; he will be obliged to answer there, to any suit brought against him on that account. We moreover say, that if while there he were himself to institute a suit against any person ; such person may sue him in turn for other cause of action, before final judgment be rendered in the original suit ; and he will be bound to answer thereto ; unless the original suit were brought on account of a theft committed

by the defendant, or for some damage, or dishonor which he had done to the plaintiff. For in that case, the defendant cannot sue in turn ; and if he does, the other will not be obliged to answer to it ; and this because his first suit was instituted to obtain reparation for an injury sustained in that place. (1)

LAW 5.

In what cases defendants are obliged to answer before the king, though they had not been previously cited before the judge of their domicils.

Other suits may arise, besides those mentioned in the preceding law, of such a nature, that by the law of Spain, defendants are obliged to answer to them in the king's court, though not cited in the first instance before the judges of their domicils. As for breaking or obstructing the public roads ; for violating a truce ; for committing premeditated murder, or a rape, or for notorious robbery ; or where they were proscribed by their city council or judges ; or where they had falsified the king's seal, or money, either gold or silver, or any other metal ; or had committed any treason against the king or his kingdom ; or when they are persons of great influence and power who are sued by orphans, or poor and needy men who cannot so well obtain justice before their own tribunals. In these cases defendants will be obliged to answer before the king's court when they are cited there ; nor can they, in any manner, excuse themselves, as the king takes cognizance of such matters by reason of his sovereignty ; and because if such crimes were to

(1) *R. ll. 8 and 9. tit. 3. B. 4.*

pass unpunished, they would turn to the common prejudice of the king and his subjects. (1)

LAW 6.

That the defendant should observe at what time the suit is brought against him, and examine well into his means of defence.

The defendant ought first to observe the time at which the suit is instituted against him, before he answers to it. For if it were instituted on a festival day, he will not be obliged to answer, unless in those instances mentioned above, when we spoke of festival days. But if it were not instituted on a day prohibited, he ought to procure a copy of the petition, and obtain a delay of three days, in order to take advice, and examine his means of defence, whether it consisted in written documents, or the testimony of witnesses, or in any other means which would assist him in resisting the plaintiff's demand. (2)

LAW 7.

In what manner the defendant ought to answer to the suit brought against him.

After the defendant has taken all the precautions spoken of above, he ought to answer to the suit, by frankly confessing that he is indebted in manner as is therein alledged, if such be the truth. For if he deny it, and it be afterwards proved, it will turn to his prejudice and shame, and he will be obliged to pay the sum claimed, together with all the costs of suit.

(1) R. ll. 8. 9. & 11. tit. 3. b. 4.—ib. l. 21. tit. 5. b. 2.—ib. R. 4. tit. 1. b. 3.

(2) R. l. 1. tit. 2. b. 4.

But if he acknowledge the debt, the judge will order him to pay so much as he acknowledges to be due, within ten days, or at a longer term, within which he may be able to pay it, at the discretion of the judge. And if he should conceive the plaintiff's demand to be unfounded, he ought simply to deny it, saying that the facts are not true, as alledged in the petition, and that he is not bound to give, or to do what is required of him. And when he has so answered, the suit is begun by petition and answer, which in Latin is called *lis contestata*, that is, issue joined. (1)

LAW 8.

The defendant sometimes admits the truth of the facts set out by the plaintiff but pleads some matter in his defence.

The defendant sometimes acknowledges the facts to be true, as alledged in the petition, but contends that he has paid the debt, or performed what was required, or that the plaintiff had agreed not to sue him, on that account. Wherefore we say, that in such and other similar cases, the judge ought to allow the defendant a certain time, at which he may establish the defence he set up : and if he establish it accordingly, the judge shall acquit him of the demand, and condemn the plaintiff to pay all the costs the defendant had incurred in the suit. But if at the appointed time, the defendant does not make good his defence, judgment shall go against him. And we moreover ordain, that if the judge conceives that the defence was set up with a view to procrastinate the cause, he shall condemn the

(1) *R. l. 14. tit. 8. b. 2.—ib. ll. 1 & 2. tit. 4. b. 4.*

defendant to pay all the costs incurred by the plaintiff, by reason of such delay. (1)

LAW 9.

Under what plea the defendant may decline answering the plaintiff's petition.

Defendants sometimes interpose such defences, as tend to prolong and not to terminate the suits brought against them : these are in Latin called *dilatorias*, that is to say, pleas which retard the progress of a cause. As where the creditor had agreed with his debtor, not to require the payment of a sum of money, or other thing which he owed him, until a fixed time, or a certain day, and were nevertheless to institute a suit before the time had arrived. Or where the defendant is sued before a judge who had no jurisdiction over him ; or where he disputes the authority of the attorney to sue, or alledges that his power of attorney is not drawn up in legal form, and that he is not therefore bound to answer to the suit. Whenever he interposes such exceptions before he answers, and supports them, they ought to be allowed, but not when interposed after issue joined. And we moreover say, that if it appear that the defendant takes his exceptions maliciously, one after the other, in order to prolong the cause ; the judge may assign a certain time, at which he shall be positively obliged to make and sustain all his exceptions at once ; and if at the time appointed, he fails to make or to sustain them, he cannot afterwards do it, but the judge shall proceed to give judgment in the cause, as is provided by the laws of this book. (2)

(1) *R. l. 1. tit. 5. b. 4.*

(2) *R. l. 1. tit. 5. b. 4.*

LAW 10.

What are the pleas which do not excuse the defendant from answering.

The defendant, sometimes, before he answers to a suit, takes certain exceptions which he alledges ought to excuse him from answering at all : as that the plaintiff is his slave : or where a man sues for the estate he inherited from his father, and the defendant denies that he is the son of the person whose estate he claims, and that he is not therefore obliged to answer ; or where the plaintiff sues for a legacy left him by will, and the defendant says he is not bound to answer, because the will was a forgery. We therefore say, that these and other similar exceptions, shall not prevent the judge from proceeding to the merits of the cause : but he ought on the contrary to compel the defendant plainly to deny or confess what was alledged in the petition, and after he had answered, then to take his exceptions, upon which the judge who will pronounce at the same time that he decides on the principal cause of action. And if the exceptions are founded in fact, judgment ought to be rendered for the defendant ; and if not, and the plaintiff make good his title, judgment ought to go against the defendant, who ought moreover to be sentenced to pay all the costs the plaintiff had incurred in the suit, as is provided above. (1)

LAW 11.

What are the exceptions which suspend all proceedings in the cause, until a decision can be had upon them.

The defendant may not only take exceptions before

(1) *R. l. 14. tit. 8. b. 2.—ib. l. 1. tit. 4. b. 4.*

he answers, as we said in the preceding law, but afterwards also ; as where the plaintiff introduces, in support of his demand, a witness, to whom the defendant objects, as not being of age, or because he is a slave ; or where the plaintiff undertakes to establish his claim, by an instrument of writing, and the defendant disputes its authenticity, or that it was not executed by the hand of a notary public. These and such like exceptions must first be disposed of by the judge, before he can proceed to determine upon the main cause of action. For they, as well as those spoken of above, are called in Latin, peremptory exceptions, that is exceptions which tends to put an end to the suit. And they are of such a nature that they may be made by the parties, either before or after issue joined, and until the moment judgment is rendered. (1)

TITLES,

Of the Roman and Spanish Laws which relate to that of LAS SIETE PARTIDAS, on Judges.

Digest, lib. 5. tit. 1. - *De Judiciis et ubi quisque agere vel conveniri debeat.*

Digest, lib. 4. tit. 8. - *De Receptis qui arbitrium receperunt ut sententiam dicant.*

Institutes, lib. 4. tit. 17. *De officio judicis.*

Code, lib. 1. tit. 48. - *De officio diversorum judicum.*

Code, lib. 3. tit. 5. - - *Ne quis in sua causa judicet vel jus dicat.*

(1) *R.l. 1. tit. 5. b. 4.*

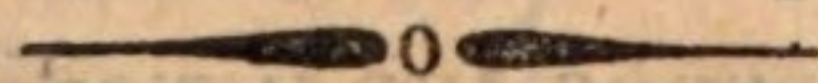
Fuero Juzgo, - - - - -	book 1. tit. 1.
Leyes del Estilo, - - - - -	law 218.
Recopilacion de Castila, - - - - -	book 3. tit. 9.
Civil Code, - - - - -	book 3. tit. 17.

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TITLE IV.

OF JUDGES,

AND WHAT THEY OUGHT TO DO AND OBSERVE

LAW 1.

What is meant by a judge, and how many different sorts there are.

A judge, when he faithfully performs the duties of his office, well deserves the appellation of judge; a word, which signifies an upright man, appointed to do

and administer justice. There are several sorts of judges : the first, and most honorable, are they who preside in the king's court, the supreme tribunal of the land, to hear and determine upon all grievances brought before them. There are others, specially appointed to hear appeals taken from the decisions of the first mentioned : and they were called superior judges (*sobre-juezes*) by the ancients, on account, as it is said, of the power they had over the others. There are others with jurisdiction over a kingdom, or over certain provinces only : and they are called *adelantados* (*presidents*,) because they have authority over the judges of those places. There are others again who are appointed to try causes in particular places, as in towns or villages. There are others appointed to decide disputes which arise between the Artizans, or a greater part of them, in every place, touching the business of their respective trades. And all the judges here spoken of, are called in Latin *ordinarios*, because they are usually appointed to determine cases which occur within their respective jurisdictions. There are other judges called delegated judges, because they derive their power to hear and determine causes, from the king or presidents (*adelantados*) or other ordinary judges. And lastly there are judges called arbitrators, that is arbitrary judges, chosen by the consent of the parties to settle any particular suit between them, and we shall now proceed to shew those things which the duties of their offices require these judges respectively to do and observe. (1)

(1) *R. ll.* 1 & 2, *tit.* 4. *b.* 2—*ib.* l. 1, *tit.* 4. *b.* 3 & *ib.* ll. 1 & 2. *tit.* 9. *b.* 3—*C. art.* 1. *p.* 440.

LAW 2.

Who can appoint judges.

Judges appointed to hear and determine causes, as we have said in the preceding law, are men who fill very important posts. And therefore the ancients thought fit that they should not be appointed by any other persons than those we herein mention: as by kings and emperors, who have the power to appoint those that are called ordinary judges. No body else has the right of appointing them, unless authorised expressly by the prince, either by letter or as a privilege; or unless they are judges elected by artizans to determine upon the manner in which their workmanship is executed, and upon other things which happen in the way of their trades; or judges delegated to determine particular suits, either by the emperors or kings or presidents of whom we have already spoken, or even by ordinary judges. But arbitrators can not be appointed, unless with the consent of both parties to the suit, as we observed above. (1)

LAW 3.

What judges ought to be, and what virtues they ought to possess.

Great care and attention must be taken to select for judges such persons only as we spoke of in the second part of this book. And if none can be found possessed of all these qualifications, they must at least be loyal, of good fame, and incorruptible. They must have the wisdom to judge rightly, either from their own knowledge, or from long experience. They must be mild in manner and speech to those who appear before them; and above all, fear God, and those from whom

(1) *R. l. 1. tit. 9. b. 3.*

they derive their authority. For if they fear God, they will avoid sin and be pious and just. And if they fear their prince, they will avoid doing those things by which they may incur his displeasure, as they in a manner, administer justice in his stead. (1)

LAW 4.

Who can not be judges on account of personal impediments.

There are certain impediments which disqualify men from being appointed judges. For according to what is prescribed by the ancients, idiots or madmen cannot be judges, as they have not the understanding to hear and determine causes, according to law; nor can the dumb, as they cannot speak to the parties when necessary, nor answer them, nor pronounce their judgments; nor can the deaf, as they can not hear the pleadings; nor can the blind, as they cannot see, recognize, or appreciate the parties; nor can a man subject to an infirmity of doubtful cure, which prevents him from appearing in court to hear causes and undergo the anxiety attendant on their investigation: nor can a man of ill fame, or who had done any thing by which he had injured his character according to the Fuero of Spain; for it would not be proper that a person of such a description should be a judge of others: nor can a member of any religious order, as he would be thereby abstracted from the services he was bound to perform to God; and as it would be moreover absurd that he who had renounced all worldly things should be occupied in hearing and determining disputes about them: nor can a woman, as it would be unbecoming

(1) *R. l. 1. tit. 9. b. 3.*

that she should appear to hear causes, among a multitude of men, unless she were a queen, a countess, or other noble lady who had inherited a kingdom or some other country; she might then be a judge in those countries, with the assistance of wise men who might rectify her mistakes, by their counsels. We moreover say, that the right of determining causes, cannot be conferred on a slave; for though he may have the necessary capacity, he might not the will, as he would be under the controul of another; who might compel him to decide according to his own wishes, contrary to law and the understanding of the slave. Yet if a slave, not known to be such, and in possession of his freedom, were invested with the power of deciding causes, all sentences and orders rendered by him, and all other things done in virtue of his office, until the day it was discovered he was a slave, would be valid. And this the ancient sages thought just: because, when a whole people commit an error, it should be overlooked by all of them, as though it had never happened. (1)

LAW 5.

Of what age a judge ought to be.

An ordinary judge, appointed to determine disputes that daily arise, should be twenty years of age, as he may at that period of life, have the necessary capacity to hear and investigate the causes brought before him. And so a delegated judge, appointed by the ordinary, should be of the same age; and if he refuse to take

(1) *R ll. 7 & 8. tit. 9. b. 3.*

cognizance of a cause submitted to him by the ordinary judge, he may be compelled thereto, if he were twenty years of age and of the place over which the ordinary's jurisdiction extended : but if he were under twenty years of age, and above eighteen, he could not be obliged by the ordinary to take cognizance of the cause, though within his jurisdiction, unless he chose to do so ; and if he were under eighteen and over fourteen years of age, any judgment rendered upon a cause committed to him, would not be valid, unless he had been chosen as judge, with the consent of both parties or the permission of the king. In that case, any judgment which he shall render according to law will be valid, and can not be avoided on the plea of his minority. (1)

LAW 6.

How a judge ought to be appointed ; what oath he ought to take, and what security he ought to give for the faithful performance of the duties of his office.

When judges have been appointed in the manner above mentioned, they should be installed in the places assigned for the administration of justice, after having taken an oath to observe the following things—the first, that they will obey all orders from the king, whether delivered verbally, by letter, or by his certain messenger. The second, that they will in every thing, regard the sovereignty, honor and rights of the king, The third, that they will, in no wise, disclose the secrets he confides to them, either personally, by writing or by his mandatory. The fourth, that they will avoid,

(1) *R. l. 2. tit. 9. b. 3.*

by all means in their power, doing any prejudice to the king; and if they cannot avoid it, that they will give him the earliest possible notice thereof. The fifth, that they will decide all causes submitted to them, with fidelity, and as soon as possible, according to the laws of this code and no other: and that they will not depart from truth and justice, neither through love nor hatred, through fear or the hope of any reward promised them. The sixth, that while they hold their offices, they will not receive themselves, nor through other persons, any gift or promise from, or on account of either of the parties who had already instituted a suit before them, or who they knew intended to institute one. And this oath ought to be administered to them by the king, or if he be not present, then, upon the holy evangelist, by persons appointed by the king for that express purpose. And after taking this oath, they ought to enter into an obligation with security, conditioned that when their term of office shall expire, they will personally remain fifty days longer in the places where they acted as judges, in order to make reparation to those whom they may have wronged. And when their term of office shall expire accordingly, they ought to cause it to be publicly proclaimed each day, calling on every person who has cause of complaint against them, to come forward and receive redress. Whereupon if any complaint be made, the judges appointed to succeed them, ought to associate with certain good respectable men, not hostile to the former judges, and jointly to hear the parties: and if they find that the former judges had done any wrong, or committed any crime, they shall cause them to make

reparation accordingly, as is ordained in the laws of this code. But if the crime committed were of a nature that deserved the penalty of death or loss of limb, they ought to be put into safe custody, and sent to the king, together with their offence set forth in writing : for in such a case, the king alone can render judgment. (1)

LAW 7.

What the judges are bound to do and observe with respect to the places where they discharge the duties of their offices.

Certain determinate public places ought to be chosen, where the judges may openly hear and decide all causes which come before them. They should take their seats early in the morning, and continue there until noon, on every day in the year except on holidays ; and again in the afternoon until night, when the causes were numerous. They should not withdraw nor conceal themselves in their houses, or other places, where the litigent parties cannot find them. Yet when they have to hear any cause of great importance, they may retire for that purpose where they will not be disturbed by the multitude. They ought, moreover, while they are hearing causes, to have with them, faithful and experienced notaries, to transcribe, in a separate book, the powers of attorney exhibited by the attornies of the plaintiff and defendant, the questions and answers, and confessions which the parties make in court, the testimony of the witnesses, the judgments that are

(1) *R. l. 3. tit. 1 & l. 56. tit. 5. b. 2.—ib. ll. 1 & 13. tit. 5. & ll. 2. 6. 9 & 9 tit. 6. & ll. 8 & 23 tit. 7. & ll. 3. 5. 6 & 19. tit. 9. b. 3.—ib. l. 3. tit. 9. b. 4.—Auto. 1. tit. 6. b. 3.*

rendered, and every thing else that occurs in the suit ; so that no doubt may afterwards arise, either through forgetfulness, or any other cause. They ought also to have attending on them, certain officers duly qualified, to execute all orders legally issued by them. They ought to be careful not to exercise any authority, or to seize any person without their jurisdiction, unless with the consent of both parties ; for then they act rather as arbitrators, than as judges ; and if they do so exceed their jurisdiction, their judgments will not be valid ; and they shall moreover pay to the person from whom any thing was thereby taken, double its value. And we further say, that if any judge shall order any corporeal punishment to be inflicted upon any man or woman not within his jurisdiction, he shall, as a penalty, receive the same punishment, he had caused to be inflicted upon the person condemned : for it would not be just that he should exercise any authority out of his jurisdiction, without the command of the king to that effect. And judges must above all, be careful not to compel strangers, who are domiciliated elsewhere, to appear and answer to suits instituted before them, unless in those cases before mentioned, in the titles of plaintiff and defendant. (1)

LAW 8.

What ought to be observed by the judges and parties when they appear in court.

Judges ought to receive and hear with mildness, suitors who come before them to obtain justice : but

(1) *R. ll. 8 c. 15 tit. 5. c. ll. 1 c. 9. tit. 8. b. 2.—ib. l. 4. tit. 9. b. 3.—ib. l. 8. tit. 23. b. 4.*

not in such manner as to bring their authority into contempt : as by permitting any of the parties to speak to them with arrogance, or to whisper in their ears in public, while seated on their judicial seats. They should prohibit such things, not only on account of the discredit it may bring upon them, but because it may excite suspicion that what was said to them, was in favor of one party, and to the prejudice of the other. We moreover say, that while one of the parties is arguing his cause before the judges, they should not suffer any other person to speak and interrupt him : but they should hear every cause in order, so that when one is begun, it should be heard and finished, before another is commenced. By this means, they will be the better enabled to understand that which is under discussion, and determine it with less difficulty. (1)

LAW 9.

What judges ought to do when a suit is brought before them, wherein their fathers or children are interested.

By a criminal prosecution is meant an accusation or complaint made in court, against any one for a crime which it is alledged he had committed, and which is punished with death, loss of limb, or other corporeal punishment, or with banishment from the kingdom ; and whenever such a prosecution is brought by or against the father or son of the judge, or any member of his family who lives with him habitually, he ought not to take cognizance of it, though he may admonish them, when they deserve it. But in such cases, he shall

(1) *R. l. 17. tit. 4. & l. 59. tit. 5. & l. 16. tit. 6. b. 2.—ib. l. 1. tit. 17. b. 4.*

give information thereof to the king, and pray that some other person might be sent to hear and determine the cause; and the king ought to comply with his request. And we say that ordinary judges should observe this rule even in causes that are not criminal, of whatever nature they may be, wherein their father, son, or any other member of their household was concerned. But if the judge were not an ordinary but delegated judge, appointed by the order of the king, to hear and determine any cause, he may try it according to his instructions, though his father or son were interested in it. And we moreover say, that if the son, or father, or one of the household of any judge, claimed any thing by such a title, that they were in danger of losing it by prescription, unless a suit were brought for it within a given time, in such case, the suit may be instituted to save the party's right. But as soon as the suit were begun and issue joined, the judge ought to proceed no farther, nor render any judgment therein; but should resign it to be determined by another disinterested judge. (1.)

LAW 10.

That a judge ought not to try his own cause, nor one in which he had been advocate or attorney.

Three persons must necessarily appear concerned in every cause, the judge, plaintiff and defendant. A judge cannot therefore preside in his own cause: for he cannot act in the double capacity of judge and party at the same time. Nor ought he to decide upon a cause in which he had been either advocate or coun-

(1) R. II. 19. & 45. tit. 5. b. 2.

seller : for, as was wisely held by the sages of the law, if he afterwards gave a judgment contrary to the opinion he had given his client, it would appear that he had deceived him ; and if he decided for him, he would be suspected of being biassed in his favor. (1.)

LAW 11.

That judges ought to use every effort to discover the truth in every cause brought before them.

Judges ought above all things, to seek for the truth, by all means in their power in every cause which the parties contest before them. First, by the confessions which the plaintiffs or defendants themselves make in court, or by the questions which they put to the parties, touching the matter in dispute. Next, by tendering the oath to them in the manner we have explained in the title which treats on that subject. And if they cannot discover it by any of these means, he should hear the witnesses brought by the plaintiff and defendant to prove their respective pretensions, by first swearing them publicly, in presence of the parties, and then receiving their testimony in a secret retired place. And after all, if they cannot ascertain the truth, neither by public acts, privileges, manifest signs, or strong presumptions, they should proceed in the manner we have prescribed in the laws of this code, which treat of that matter ; and when they shall have finally discovered it, they shall give judgment agreeable to justice. (2.)

(1) *R. l. 18. tit. 5. b. 2.*

(2) *R. l. 57. tit. 5. b. 2—ib. l. 50. tit. 4. b. 3—ib. l. 10. tit. 17. b. 4.*

LAW 12.

That it is the duty of judges to decide with promptitude, all suits instituted before them.

Judges ought to determine every suit brought before them with all possible dispatch: for, as was said by the ancient sages, no suit will remain long undecided by upright and intelligent judges. Yet if they be prevented from deciding them by sickness, or by going on a pilgrimage, or a mission in a foreign country; by the expiration of their term of office, or by death; their successors in office may take them up in the state in which they find them, and after investigating and understanding them, proceed to judgment in the same manner as if they were originally commenced before them. We moreover say, that judges ought fully to do justice to the parties, in such manner that they will not be obliged to apply to the king for redress: and if they fail therein, they ought to be punished at the discretion of the king, and to pay besides, all the costs which the party injured had thereby sustained. But when obstinate suitors refuse to apply to the ordinary tribunals, where they might obtain justice, or when they refuse to obey any sentence legally pronounced against them, and thereupon apply to the king's court, the king should chastise them in an exemplary manner, as obstinate and perverse litigants, and send them back to their own tribunals. (1.)

LAW 13.

That judges ought not to discover their opinions to the parties until judgment is pronounced.

Men sometimes present themselves before their

(1) R. l. 1. tit. 17. b. 4.

judges, weeping, and with appearance of great affliction, complaining of having received some great dishonor, damage or injury from other persons: and though judges should sometimes feel compassion for others, they should not have the weakness to weep with them, or too hastily to believe what they say, before the party complained of had been cited to appear, and heard in his defence. And this for two reasons: first because it is not a proof of firmness and integrity in a judge to too hastily discover the emotions of his heart, by the expression of his countenance. The second, because persons sometimes complain in this manner, in order to conceal their sinister intention, and to raise prejudices against those of whom they complain. We moreover say, that when the judges discover that one of the parties prosecutes an unjust cause, or is guilty of the crime of which he is accused, they should not, in any way manifest the opinion they intended to give, either by words or signs, until final judgment be rendered. By such conduct, judges will shew themselves to be wise, enlightened, firm, and of good intentions: they will add dignity to their offices, and be honored and feared by those around them. (1.)

LAW 14.

When the judges dare not proceed to try the prisoners brought before them, they should send them to the king, together with the accusations against them, reduced to writing.

(Not in force.)

LAW 15.

That judges should be careful that their judgments are carried into execution.

(Not in force.)

(1) R. l. 5. tit. 4, & l. 82. tit. 5. b. 2.

LAW 16.

That the judges daily engaged in deciding causes, should see that justice and peace were maintained in their respective jurisdictions.

(Not in force.)

LAW 17.

What should be done and observed by the ordinary judges who put others in their places to hear and determine certain particular causes.

(Not in force.)

LAW 18.

What are and what are not the suits which the ordinary judges can delegate to others to try.

(Not in force.)

LAW 19.

What ought to be done and observed by judges who are delegated to hear and determine particular causes.

(Not in force.)

LAW 20.

What the king ought to do, when the parties pray that a judge may be delegated to try a cause ; and what is the power of the judges thus delegated.

(Not in force.)

LAW 21.

How the power given to the delegated judges, is taken away.

(Not in force.)

LAW 22.

In what manner delegated and ordinary judges are to act, when they are suspected of partiality by either of the parties.

Though the defendant may suspect the ordinary judge of partiality, he cannot on that account, decline

his authority : for as he was selected as a fit person by the king, and clothed with the power of hearing and determining all causes arising within his jurisdiction, it is not becoming that he should be suspected of doing injustice. (1)

(No other part of this law in force.)

LAW 23.

How many kinds of arbitrators there are, and how they are appointed.

By arbitrators, in Latin, is understood in common speech, judges, chosen by the consent of the parties, with authority to determine the dispute existing between them. There are two kinds of arbitrators. The first, where the parties submit to them their differences and disputes, to be heard and determined according to law. When they are thus appointed, they ought to proceed to try the cause, in the same manner as if they were ordinary judges ; to require the parties to commence suit by petition, and answer ; and thereupon to hear and receive the proof, arguments, and defence of them both ; and lastly, to give a definitive judgment accordingly as they shall think the law requires. The other kind of arbitrators, is what is called in Latin, *arbitratores* ; that is in common speech, amicable compounders, or mutual friends, chosen by the consent of the parties, to compose and settle the differences existing between them, in such manner as they shall think proper. And as such, they have the power, from the moment disputes are submitted to them in this way, to hear the respective parties, and

(1) *R. l. 1. tit. 10. b. 4.*

compose their differences as they shall think fit. And any judgment or award they may render thereon, in good faith and without fraud, will be valid, notwithstanding the matter may not have been brought before them by petition and answer, or that they may have omitted some of those things which other judges were bound to observe. But if their judgment had been given through fraud or malice, it ought to be rectified at the discretion of good men, (*omes buenos*) chosen for that purpose, by the judge of the place where the dispute arose. And when the parties submit their differences in this way, to arbitrators, they ought to specify the particular thing about which they dispute: and whether they submitted only one difference or more; or whether they submitted all the differences which had arisen between them until that day. They ought moreover to explain in what manner the arbitrators are authorised to decide, as their power to hear and determine is confined to those things only, which are submitted to them, and in the manner prescribed by the parties. They ought moreover to promise to observe and obey, the orders and decrees rendered by the arbitrators, touching their differences, under a certain penalty, which the party refusing to comply will be obliged to pay to him who is willing to submit to them. For if no penalty had been stipulated, they will not be bound to comply with any order or decree rendered by the arbitrators; unless they were silent and made no opposition thereto, within ten days after sentence had been pronounced: for then they would be bound thereby, though no penalty had been stipulated, as we shall hereafter shew. And every

thing agreed upon by the parties at the time they submit their differences to arbitrators, ought to be reduced to writing by a notary public, or sealed with their seals, so that no doubts about the matter may thereafter arise. (1)

LAW 24.

What are, and what are not the disputes which the parties can submit to arbitrators.

Every cause, whatever may be its nature, may be submitted to the decision of arbitrators, unless it involve the punishment of death, loss of limb, banishment from the kingdom, or the liberty or slavery of any person ; or unless it relate to things appertaining to the common interest of any place, or of the whole kingdom ; for notwithstanding any one of the inhabitants of the place might in that case appear either as plaintiff or defendant, yet he cannot submit the matter to arbitrators, and if he were to do so, the judgment rendered thereon would not be valid. Nevertheless, if all, or the greater part of the inhabitants of the town, constitute an attorney with power to appear for them, and submit any dispute touching their interest, to arbitrators, he may do so. We also say, that no dispute or suit concerning the marriage of any person, can be submitted to arbitrators ; nor can one of the parties constitute his adversary an arbitrator, with power to decide their differences ; and if he be so constituted, any sentence he may render thereon, will be void, for it is not fit that any one should be judge in his own cause. Yet where a man had done another some injury, or dishonor, and

(1) *R. l. 4. tit. 2. b. 4.—ib. l. 2. tit. 16. b. 5. C. tit. 17. b. 3. of Compromises, p. 440, &c.*

put himself at his discretion, declaring he would make any amends which the party injured might require; the latter may then act as an arbitrator. But he ought to be very lenient, and decree what was reasonable and just, having regard to the nature of the injury or dishonor he had received, and the person from whom he had received it; and what he determines in this manner will be valid. And if he demands an unreasonable reparation, his decision ought to be corrected by good men, and the other party will not be bound to abide by it, notwithstanding the cause had been submitted to him, and he had sworn to determine accordingly as he might think just. We moreover say, that where a suit is instituted before an ordinary judge, the parties cannot constitute him an arbitrator, to determine the same according to law. But if they, of their mutual accord, submit the cause to him to decide, in any way he thought fit, as their common friend; the judge may then act as arbitrator between them, though the suit may have been brought before him in the first instance; and all he shall do and order therein will be valid. Or if the parties choose, they may submit their disputes to other arbitrators in any manner they please, even after suit is begun. (1)

LAW 25.

Who they are, that can submit their differences to arbitrators;

If the parties were capable of appearing in court for themselves before the ordinary judges, they may proceed before the arbitrators to whom they had sub-

(1) R. l. 4. tit. 2. b. 4—ib. l. 2. tit. 2. b. 5.

mitted their difference : but they cannot proceed, if they are persons prohibited from appearing in court for themselves. Wherefore we say, that if a minor, under the age of twenty five years, submit his cause to arbitrators, without the order or authority of his guardian, and sentence be thereon given against him, he will not be bound by it, unless he choose, nor incur any penalty by refusing, though he may have given security to abide the award. But the securities will be obliged to pay the penalty in which they had obligated themselves, if the minor will not comply with the judgment, and were fourteen years of age. And if he were of that age, and without a guardian, and had submitted his cause to arbitrators, we say he will be obliged to abide by their award, or to pay the penalty he had stipulated ; unless he could prove that the sentence had been founded in fraud, or he had been prejudiced by his own fault, or the fault of his counsel ; or that he had sustained great damage by the award ; for by proving any of these things, he would not incur any penalty ; though he should refuse to stand to the decree or judgment of the arbitrators. (1)

LAW 26.

What ought to be done and observed by the arbitrators, when the parties desire to submit their differences to them.

Men should always desire, if they wish to obtain justice, to submit their differences to arbitrators. And when they have done so, the arbitrators ought to make every effort to settle and determine them, so as to re-establish peace between the parties. And in order that

(1) *R. l. 2. tit. 16. b. 3.*

the arbitrators may not err, they ought first to examine if the cause submitted to them, be of a nature, to be determined by arbitration ; and if it be not, they cannot take cognizance of it. They ought likewise to take care, that the parties, at the time they submit their differences, bind themselves under a certain penalty, to abide by the award : for if no penalty be stipulated, they will not be bound by it, unless they choose, as we have shewn above ; and all the labor spent in hearing them, would be vain and fruitless. And if one of the parties were to bind himself under a penalty, and the other should deliver any thing to the arbitrators, as a pledge, under an agreement that if he did not stand to the award, he would lose and forfeit it, to the other party who complied therewith : such or any like agreement, we say, would be valid, and ought to be observed ; and the arbitrators may proceed to adjust the dispute, in the same manner as if the parties had mutually bound themselves under a similar penalty. We moreover say, that the arbitrators ought to be careful not to determine the differences submitted to them, in any other manner than as authorized by the parties ; otherwise their judgment will not be valid. And we also say, that if the parties wish to submit their differences to arbitrators, under condition that they shall not decide thereon, in any other manner than as shall be prescribed to them by a third person, indicated by the parties ; the arbitrators cannot act in such case, as their judgment would be void. And this the sages of the law thought a wise provision ; because the power of deciding according to their own judgment ought to belong to

the judges appointed to settle the dispute, and not to any other person. Nevertheless they may and ought to take the advice of good men, when any doubts arise concerning the matters submitted to them. But if the parties stipulated that in the event the arbitrators by them chosen, cannot agree upon the matter submitted to them, they should associate with them, another person, indicated by the parties ; the arbitrators may act under that condition. And if the parties do not accordingly designate such third person, to decide in case of disagreement, then the arbitrators may select for that purpose any person they please. And if they refuse to do it, the ordinary judge may compel them thereto, at the request of both or either of the parties. (1)

LAW 27.

What is to be done and observed by the arbitrators when the parties submit their differences to them to be decided within a certain time.

If the parties fix a certain day at which the arbitrators are to decide their differences, we say they may render their judgment at any time before the arrival of that day, but not afterwards ; unless the parties had given them power to prolong the time, in case any thing should happen to prevent them from deciding before its expiration. And even when the parties had given them such power, and they wished accordingly to prolong the time allowed them, they cannot do it if both parties oppose it : if therefore they refuse or cannot give their judgment at the fixed time, they cannot

(1) *R. l. 4. tit. 21. b. 4. C. art. 20 & 21. p. 442 & 444.*

afterwards proceed any further in the matter. But if one only of the parties opposes the prolongation of the time by the arbitrators, he would incur the penalty he had stipulated when the cause was submitted to them: and they will thereafter have no power whatever to proceed any further in the matter. And if it happen that both parties desire to prolong the time, and the arbitrators are unwilling to consent to it, for some just cause, they cannot be compelled to it. Wherefore they cannot render judgment after the expiration of the limited time, as their power is then at an end. But if the parties had fixed no time at which the judgment was to be rendered; then we say the arbitrators ought to render it, as soon as possible; so that not more than three years shall elapse from the day the matter was submitted to them: for after that time they would no longer have any power to act. We moreover say, that if the parties had indicated a place where the arbitrators are to deliberate upon their disputes, that they shall accordingly hear the parties and render judgment in that place and no other. And if they had not indicated any place, then the arbitrators ought to proceed in the town or place where the matter in dispute was submitted to them. And whenever they enter upon their duties, they ought to summon the parties to appear before them, otherwise they cannot proceed, unless it had been agreed at the time they were chosen, that they should determine the disputes submitted to them, without notifying the parties to appear. (1)

(1) *R. l. 4. tit. 2. b. 4.*—*C. art. 7, 15, 26 & 27. n. 442 & 444.*

LAW 28.

What is to be done by the arbitrators when one of them dies or enters into religious orders, or becomes by any other means unqualified to act, before the termination of the matter submitted to them.

When one of the arbitrators die, before a judgment is rendered upon the matter submitted to them, those who survive, can proceed no further therein, because their power ceases by the death of their colleague. But if, at the time of the submission, the parties had expressly given power to the arbitators to act, notwithstanding the death of one of them, we say those who survive, may then proceed to render their judgment. We also say, that if one of the parties, who made the submission die, the arbitrators cannot afterwards proceed to render their judgment; unless it had been agreed by them at the time they made the submission, that notwithstanding the death of one of them, the arbitrators might nevertheless proceed to render their judgment: for in that case they may proceed accordingly, after first citing the heirs of the party deceased. So we say, that if either of the arbitrators enter into religious orders, before they had given their judgment; or for any cause whatever lose his liberty and be again reduced to a state of slavery; or were forever banished from the empire, the effect would be the same as if he had died. We likewise say, that if the thing which is the subject of dispute between the parties should die or be lost; or if the party claiming it were to yield it up to his adversary, agreeing never again to demand it of him; that then the arbitrators could no longer in-

terfere in the matter, as their power would thereby cease. (1)

LAW 29.

That arbitrators may be compelled to decide upon a cause submitted to them, when they refuse to do it.

Arbitrators are appointed by their own consent, to decide the differences submitted to them, and not by compulsion. And as they have it in their power, when selected for that office, to refuse to accept, yet when they have accepted, they cannot afterwards refuse to act. If therefore one of the parties complain to the judge, that the arbitrators prolong the decision of the dispute submitted to them, when they have it in their power to determine it; the judge shall call them before him, and assign to them a certain time at which they shall give their decision; and if they remain obstinate still, and refuse to render it, he ought to compel them thereto by confining them in a house until they do render it. But if the arbitrators happen to be of an even number, as two, or four, and were equally divided in opinion, the one half wishing to give one judgment, and the other half another; in that case we say, that the ordinary judges may compel the parties, as well as the arbitrators, to choose some good man, as their common friend, to decide upon the rights of the parties, and to cause all of them to unite together and determine their differences. And if they cannot all agree, the opinion of the majority shall prevail. (2)

(1) *R. l. 12. tit. 4. b. 5—ib. l. 2. t. 16. b. 5. C. art. 35. p. 444.*

(2) *R. l. 4. tit. 21. b. 4. C. art. 19, 21 & 23. p. 444.*

LAW 30.

In what cases arbitrators may be excused from trying causes submitted to them, when they are unwilling to serve.

There are certain causes which legally excuse arbitrators from acting on disputes submitted to them, when they are unwilling to serve. As where the parties, after the submission, put the same matter at issue before the ordinary judge; they cannot afterwards return to the arbitrators and compell them to hear their case, if they should be unwilling to serve. And so if they had submitted their differences to one set of arbitrators, and should afterwards submit them to others: for then though they should wish to return to the first, they are not obliged, nor can they be compelled to hear the parties unless they choose. But if one only of the parties, after having submitted the cause to arbitrators, transfer it before the ordinary judge against the consent of the other, he will thereby incur the penalty stipulated at the time of the submission, and the arbitrators will no longer be bound to determine the matter. We likewise say, that if both, or one of the parties, defame or illtreat the arbitrators, they cannot be afterwards compelled to decide the matter submitted to them, although the parties should repent and desire to make amends. And so an arbitrator may be excused from serving when he has to go away on a pilgrimage, or in obedience to the orders of the king, or his council; or when he is prevented from serving by some indispensable business of his own, or by sickness, or any other real hindrance. In all these cases he ought to be excused, and cannot be compelled to proceed any further unless he choose. (1)

(1) *R. l. 4. tit. 21. b. 4.*

LAW 31.

For what causes arbitrators may be prohibited from acting upon cases submitted to them though they should be willing to proceed.

Every one should be distrustful of the enmity of others. If therefore one of the arbitrators discovers himself to be the enemy of either of the parties, after the submission, such party may on that account, inform him of his suspicions, and forbid him, in presence of respectable persons, from proceeding any further in the cause. If, however, he will not desist, the party may complain of him before the ordinary judge, who after assuring himself of the fact, ought to forbid the arbitrator from intermeddling any further in the matter. And either of the parties may take the same measures, where he suspects the arbitrators on account of any money, or present, which he alleges the other had given, or promised them. And if the arbitrator be so perverse as not to abstain from intermeddling, after being forbid by the judge, any judgment or order he may thereafter render, will be void, and the party who refuses to obey it, will not incur any penalty on that account. (1)

LAW 32.

What the arbitrators ought to do when they desire to render their judgment.

The parties, when they submit their differences to arbitrators, usually authorize those who are present to render their judgment where they wish to do it, though all of them should not happen to be together.

(1) *R. l. 4. tit. 10. b. 2.*

In such case, we say, that the arbitrators must render their judgment in the way prescribed by the parties, and in no other. But if the parties had been silent in this respect at the time of the submission, then we say, all the arbitrators must be present when they give their judgment; and what the whole, or a majority of them determine, shall be valid. And if all of them be not present, the judgment rendered by a part of them will not be valid, although they were superior in understanding and number to those that were absent; and this the ancient sages thought proper for this reason: that as the matter had been submitted to all of them absolutely, the opinion of each ought to be known before judgment can be given, and because those who were absent, might, were they present, adduce such reasons as to cause a very different judgment to be given. And we moreover say, that the arbitrators ought not to render their judgment on those days on which it is prohibited to decide, as we have observed in the title which treated of plaintiffs; unless in those cases in which the ordinary judges might decide. But if the parties had authorised the arbitrators to determine upon all the differences that existed between them, in whatever manner they thought proper, their judgment would, in that case, be valid, notwithstanding it had been rendered on a day in which it was forbidden to others to decide. We also say, that the arbitrators ought to be very careful not to intermeddle with any other cause than that submitted to them, unless for the fruits or rents growing out of the object in dispute between the parties: for they may decide concerning these, in the same manner they do upon

the principal matter before them. We also say, that where many causes, or differences, are submitted to them, they may and ought to render separate judgments upon each of them; unless the parties had declared at the time of the submission, that all their differences should be determined by one sentence: for then the arbitrators will be bound to render their judgment in the manner stipulated at the time they were chosen. (1)

LAW 33.

That arbitrators may by their judgment fix a delay within which the parties shall perform or pay what they decree.

When the arbitrators decree that the parties shall give or do something, they may fix a time at which their judgment is to be executed: in that case, we say, the parties shall accordingly comply. And if either of them refuse, he shall pay the other the penalty stipulated at the time of the submission; and he cannot excuse himself by alleging that no power had been given to the arbitrators to fix on a certain time for the performance of their sentence: for though no such power had been given them, yet they may exercise it in virtue of their office. And if by their judgment they fix no time for the performance of their decree, then we say the parties shall be allowed for that purpose a term of four months, at the expiration of which, the party who refuses to comply will incur the stipulated penalty. But if at the expiration, even of

(1) *R. l. 4. tit. 21. b. 4.—ib. l. 12. tit 4—& l. 2. tit. 16. b. 5. C. art. 24, 29 & 31. p. 444.*

the four months, the penalty be demanded of the party refusing to comply, he will not be obliged to pay it, if he be willing immediately to perform and accordingly does perform what has been decreed by the arbitrators. But he cannot excuse himself from paying the penalty when it is demanded of him after the expiration of the time, by saying that he is willing to perform the decree. And this provision the sages of the law have thought wise : because, it is a more serious thing to condemn the order of a judge than the command of the law ; and because it is easier to escape the penalty of the law when once incurred, than a penalty imposed by the decree of a judge. (1)

LAW 34.

For what cause a party may be excused from paying the penalty, though he should not comply with the decree of the arbitrators.

A party may be excused from paying the penalty stipulated at the time of the submission, notwithstanding he had not complied with the decree of the arbitrators ; as where he had been prevented from complying with it, by severe illness at the time, or by being sent abroad by the king or his council, whose orders he was obliged to obey ; or where he had been prevented by any accidental hinderance which might equitably excuse him from complying with it. But if after such hinderance were removed, he should be unwilling to comply with the decree, he would then incur the penalty. We also say, that if the order or decree of the arbitrators be contrary to law, nature, or

(1) *R. l. 4. tit. 2 b. 4.*

good morals, (*buenas costumbres*) or so unreasonable as that it can not be executed ; or if it had been obtained through bribery, or by false witnesses ; or had been rendered upon a matter not submitted to the arbitrators ; in all these cases, when the fact shall be made appear, the decree will not be valid, nor will the party who refuses to obey it, incur any penalty on that account. (1)

LAW 35.

That no appeal can be taken from the sentence of the arbitrators

Some of the parties being dissatisfied with the sentence of the arbitrators, may proceed to appeal therefrom, thinking they have a right to do so : but we say that no such appeal can be had. He however, who is unwilling to comply with the decree, may pay the stipulated penalty, and then he will no longer be bound by it. And if none were stipulated at the time the arbitrators were chosen ; then we say, that the party who is unwilling to comply with their decree, shall immediately declare it, and he will not thereafter be bound by it. But if the parties approve the decree, by saying, when it was rendered, that they will comply with it ; or confirm it, by signing the judgment ; or remain silent, without opposing it, during ten days after it is rendered ; in all these cases, the sentence will be valid. And if either of them apply to the ordinary judge of the place, he ought to cause it to be executed in the same manner as if it had been rendered by any other judge, who had a general power to hear and determine causes. (2)

(1) *R. l. 4. tit. 21. b. 4.*

(2) *R. ll. 1 & 4. tit. 21. b. 4. C. art. 32 & 33. p. 444.*

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
Attornies, (*Personeros*.)

Digest, lib. 3. tit. 3. - - *De Procuratoribus et defensoribus.*

Code, lib. 2. tit. 13. - - *De Procuratoribus.*

Fuero Juzgo, book 2. tit. 3.

Fuero Real, book 1. tit. 10.

Leyes del Estilo, Law 11 to 17, included.

Civil Code, book 3. tit. 13. p. 420, &c.

OF ATTORNEYS—(*PERSONEROS*.)

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TITLE V.

OF ATTORNEYS.

LAW 1.

What an attorney is, and what is the meaning of the term.

An attorney is he who sues for another, or does any thing for him by his orders. And he is called attorney (*personero*,) because he represents the person of another, either in or out of court. (1)

LAW 2.

Who can appoint an attorney.

Every person who is twenty five years old, free, and of sound mind, and not under the power of another, as of his father or guardian, may appoint an attorney, in any suit which concerns him. Nevertheless there are certain cases wherein an attorney may be appointed by a person under the power of his father. As where a suit is brought concerning the *peculium* of the son, called *castrense* or *quasi castrense*, which belonged to him exclusively, and to which his father had no claim, as we have said in the title which speaks of the power that fathers have over their children. And so where the father had sent his son to school, or to any other place, and while on the way, or when there, any thing happen for which he had to bring or sustain a suit. Or where the father is absent from his usual place of residence, or the place where his estate is situated, and something happen for which the son

(1) *R. l. 2. tit. 24. b. 2.*

has to appear in court, either as plaintiff or defendant, touching the interest of his father. In each of these cases, the son may appoint an attorney, as well to sue for, as to defend his own interest or that of his father, whenever the latter is absent. But with respect to those things which concern his father, he must give security (*recabdo*) that what is done by him or his attorney, shall be ratified by his father. And we moreover say, that bishops, in all things relating to them ; corporations and convents, and the masters of military orders, with the authorization of their convents and councils, may appoint attornies to represent them in all matters touching their interest, in or out of court. (1)

LAW 3.

That a minor under twenty-five years of age, may appoint an attorney with the consent of his guardian.

A minor under twenty-five years of age may, with the consent of his guardian, appoint an attorney to appear for him in court. But if he appoint one without the authority of his guardian, whatever the attorney does to the minor's advantage will be valid. But if judgment be rendered against him, or the attorney do any thing to the minor's prejudice, it will not be valid. And we moreover say, that a guardian cannot appoint an attorney to sue for his minor, or defend a suit brought against him, unless the guardian had already begun or answered to the suit in person : he may then appoint an attorney if he think fit so to do.

(1) *R. 7. 7. tit. 25. b. 4.*

LAW 4.

That a person claimed as a slave, may appoint an attorney.

When a man in the enjoyment of his liberty, and under the controul of no one, is sued and claimed as a slave, he may appoint an attorney to appear and defend his cause. And so if he bring a suit for money, or any other thing, he may appoint an attorney to conduct it for him, even after he has joined issue in the cause in which he is claimed as a slave. But where a man who is in a state of slavery and under the power of another, alleges that he is free, and wishes to bring a suit against the person who restrains him, for the recovery of his liberty ; in that case we say, he may bring the suit himself, but he cannot appoint an attorney to do it for him. Yet when such a suit is instituted, the judge ought to compel the person under whose power he is, to appear in court, and give security that he will not molest the other, in the free prosecution of his rights. We moreover say, that any of his relations, who alleges that the slave ought rightfully to be free, may, if he choose, bring a suit for the recovery of his liberty, though he were not appointed attorney for that special purpose. For the ancient sages have thought liberty of such inestimable value, that they conceived it proper that not only the relations of a person wrongfully held in slavery, but any stranger whatever might bring a suit for his freedom, without any letter of attorney to that effect ; as every law of every country should lend their aid in support of liberty. (1)

(1) C. art. 18. p. 40.

LAW 5.

Who can and who cannot be appointed an attorney.

Every person may be attorney for another who is not prohibited by any of the laws of this code. They who are prohibited are, the minor under twenty-five years of age ; a mad-man or lunatic ; a person dumb, or entirely deaf, or one who is accused of some high offence, while the accusation continues. Nor can a woman appear in court as attorney for another, unless for her ascendants or descendants in the direct line, who are old or infirm, or labor under some other impediment, and have no other person to whom they can confide the management of their cause. We also say, that a woman may act as attorney in delivering her relations from a state of slavery, and take and prosecute an appeal from a judgment condemning any of them to death. We also say, that no member of any religious order, can act as attorney, except in causes which concern the order to which he belongs ; and not then, unless under the command of his superior, whom he is bound to obey. Nor can a clergyman in holy orders appear as attorney, unless in causes in which his church, prelate or king are concerned. Nor can a slave be an attorney unless he belong to the king ; though he can act as such out of court, to recover any thing appertaining to his *peculium*, or which concerns his master. We likewise say, that a person who passes for free may be an attorney pending a suit against him, in which he is claimed as a slave. (1)

(1) *R. l. 7. tit. 25. b. 4.*

LAW 6.

That military men (cavalleros) employed on the frontiers, or in the service of the king, cannot act as attorneys for other persons.

Military men in the pay, and employed in the service of the king or other lord, on the frontiers or elsewhere, cannot while in service there, act as attorneys in any cause, unless it concern the corps to which they belong; though they may act as such when they have returned to abide at their homes; as may all others who stay at home, and who are not placed at particular posts, in actual service. And so we say of the military men employed at the king's court, that while there, they cannot act as attorneys for other persons, lest they should thereby be diverted from the service of their lord, and should, through their power and acquaintance at court, oppress and burden their adversaries with costs.

LAW 7.

In what cases a military man may act as attorney (personero.)

Notwithstanding we have said in the preceding law, that a military man employed in the service of the king or other lord, or any person employed at the king's court, cannot be an attorney for other persons, yet there are three cases in which he may. The first is, where he defends his relations in court against one who claims him as a slave. The second, where he defends the cause of any person unjustly condemned to death and detained in confinement, without being heard. And the third, where he is appointed attorney in a cause, and the adverse party voluntarily join issue therein without contesting his right to act as attorney: for af-

terwards he cannot contest it, but the attorney may proceed until the suit be terminated. (1)

LAW 8.

What officers of the king cannot act as attorneys for others.

Neither the presidents, judges, or notaries of the king's court, nor other officers in high power, can act as attorneys for others in that court, unless in the three cases mentioned in the preceding law. And this for two reasons. First, that such persons may not thereby be hindred from performing the duties of their respective offices. The second, because they may cause great expenses and trouble to those against whom they act as attorneys, by using, as we have above said, the power they have in virtue of their offices, to prolong the causes in which they are engaged. (2)

LAW 9.

That they who are sent on a mission, cannot act as attorneys for others.

A person sent on a mission by the king, or for the benefit of his corporation or country, cannot, from the time he has accepted the mission, act as attorney in any suit in the place whither he is sent, or elsewhere, until he shall have returned, lest by intermeddling with the business of others he may be turned aside from the principal object of his mission. (3)

(1) *R. l. 1. tit. 24. b. 2.*

(2) *R. l. 1. tit. 24. b. 2.*

(3) *Auto 2. tit. 6. ch. 15. b. 3. Auto 1. tit. 7. b. 6.*

LAW 10.

What persons may reciprocally sue or defend suits for one another, without any letter of attorney to that effect.

No one can take upon himself to act as attorney for another, or to institute any suit for him, unless authorized by him to that effect, except a husband for his wife, or a relation for his relation, as far as the fourth degree ; or for others with whom he is connected by marriage ; as for his father-in-law, or his son-in-law, or brother-in-law ; and likewise for his freedman. In all these cases, they may reciprocally institute suits for one another, without any letter of attorney, unless where they claim something contrary to the wish of the person in whose name they sue. And the same rule applies to co-heirs, or co-proprietors of an estate, or any thing else which they hold in common. But such attorney ought, before entering upon any suit, to give security, under a certain penalty, that they whom he represents shall ratify all that is done in their name, and comply with the judgment rendered in the cause, or that he and the securities will pay the stipulated penalty. But he will not be obliged to give the security, unless it be required by the other party, before issue joined ; for afterwards he would have no right to demand it. What we have above said applies only where one takes upon himself to bring a suit for another without his authority : but every man, whether a relation or not, and without any letter of attorney to that effect, may answer for and defend any person who is sued and not present, provided he give security that the person whom he represents shall ratify what is done

in court, and comply with the judgment rendered in the cause.

LAW 11.

What persons ought not to plead their own causes on account of their rank or dignity, but should employ attorneys to do it for them.

(Not in force.)

LAW 12.

In what suits attorneys may be appointed, and in what, not.

(Not in force.)

LAW 13.

In what manner an attorney may be appointed.

The way in which a man may appoint an attorney is as follows: he must expressly mention by name the person whom he appoints; and he may appoint him, whether the attorney be absent or present. When the appointment is made verbally, in the presence of the attorney, or by writing in his absence, the person appointing should use the following or like words, "I entreat, or I request, or command such a one to be my attorney in such a cause; or I give him power to that effect." And so one may, through his messenger, appoint an attorney. And in whichever of the foregoing ways he is appointed, his appointment may be made perpetual, or for a given time, with or without any condition. (1)

LAW 14.

In what manner a letter of attorney ought to be made, and what should be specified therein.

In order that the judges may be certain when a let-

(1) *R. l. 13. tit. 21. b. 4—ib. l. 45. tit. 25. b. 4. § 3. n. 6.*

ter of attorney is sufficient, we propose to explain in this law, the manner in which it should be made ; and we say it may be made in two ways. The first, when it is executed by the hand of a notary public of the council. The second, when it is executed by the hand of any notary whatever, and sealed with the seal of the king or other lord of any place, or with that of the arch bishop, bishop, or any other prelate or chief of any order, or with the seal of any council. The third is, where one of the parties to a suit appoint his attorney before the judge and requires it to be written in the register of such judge. And when the letter of attorney is made by the hand of a notary public, or sealed with any of the aforementioned seals, it ought to contain the name of the person appointing, and of the attorney appointed ; the name of the adverse party ; the title of the suit in which the attorney is to appear, and the name of the judge before whom it is to be tried. Power should also be given to the attorney to sue or to answer, to confess or to deny ; and the person appointing him, ought finally to declare that he binds himself to ratify what his attorney does in the cause, and that he obligates all his estate for the fulfilment of what may be decreed against him therein. The letter of attorney should moreover contain mention of the place, the day and year in which it was executed. But when one of the parties appoints his attorney before the judge, in the third manner we have above mentioned, it will suffice that he declare it, and that it be written on the records of the cause, that such a one has appointed such a one, his attorney in such a suit which he has before such a judge, against such an adversary. For by such

words as these, the attorney will be as effectually authorized to commence and follow up the suit, as if every thing else were specified in writing. And if the letter of attorney be drawn up by a notary public, the names of the witnesses before whom it was executed ought to be mentioned. (1)

LAW 15.

In what manner an attorney should be appointed, who demands restitution for a minor.

Where an attorney intends to sue in behalf of a minor under twenty-five years, for restitution against any damage or loss he had sustained, or fraud that had been practised upon him, he cannot act unless his letter of attorney contain an express power to that effect, notwithstanding it may contain the general expressions mentioned in the preceding law. When, therefore, such minor appoints his attorney with the consent of his guardian, to bring a suit to nullify any judgment rendered against him, or to rescind any contract made to his prejudice, the letter of attorney ought to contain a special power to that effect, as well as all the other expressions mentioned in the preceding law. And the restitution here spoken of, is what is called in latin *restitutio*. (1)

LAW 16.

In what manner a father may appoint an attorney to sue for the recovery of his child, detained by another person against his will.

When any one detains the child of another in his

(1) *R. l. 13. tit. 25. b. 4—ib. l. 45. tit. 25. b. 4. § 3. No. 6.*

(1) *R. l. 13. tit. 25. b. 4—ib. l. 45. tit. 25. b. 4. § 3. No. 6. C. art. 10. p. 422.*

house or power, contrary to the will of the father, who desires to appoint an attorney to sue for the recovery of his child, the letter of attorney for that purpose ought to contain two things.—First, that special power is granted to the attorney to bring such a suit; for a general power to transact all matters would not enable him to do it. Second, that the father is prevented from bringing the suit by some legal impediment, which ought to be mentioned in the letter of attorney, as the reason why he could not do it himself: for unless he were under such impediment, he must bring the suit himself, and not through another person. (1)

LAW 17.

In what manner a letter of attorney should be made to enable any one to accuse the suspected guardian of a minor.

When any one wishes to sue for the removal of the suspected guardian of a minor, he ought to bring the suit in person, and not by his attorney to whom he had only given a general power. But if the letter of attorney contained a special power to accuse the suspected guardian, it will be valid, and ought to be allowed by the judge. (2)

LAW 18.

In what manner several attorneys may be appointed in the same cause.

A man may at will appoint one or several attorneys, to bring or to answer to a suit. But if he appoint several, and grant power by the letter of attorney to each of them, to act fully in the cause, whoever then com-

(1) *R. l. 13. tit. 25. b. 4—ib. l. 45. tit. 25. b. 4. § 3. No. 6.*

(2) *R. l. 13. tit. 25. b. 4.*

mences it, will be bound to follow it up until it is finished, and the others should not intermeddle at all. But if all of them together bring the suit or answer to it, any one of them may afterwards follow it up until it is decided, although the others were not present. And when all of them present themselves together in the cause, and the adverse party find it burdensome to argue against the whole of them, they should choose one among themselves to appear for the others : and if they disagree in the choice, the judge shall select which of them he thinks best able to advocate the cause. But if it be not expressed in the power of attorney that each of them have power to act fully in the cause, then neither of them can prosecute or defend beyond what falls to his part. And if all of them together choose to bring the suit, they may do it, if every one be present, or they may appoint one to argue it, with the consent of all the others. (1)

LAW 19.

What an attorney has a right to do.

An attorney can do nothing in a cause beyond what is permitted or commanded in his letter of attorney ; and if he does, it will not be valid. He cannot therefore agree with the adverse party to submit the cause to arbitrators, or make any agreement with him affecting the suit, or release him from the demand, or tender him the decissory oath, unless he had been specially authorized to that effect ; or unless full and entire power had been given him in the letter of attorney, to

(1) *R. l. 13. tit. 25. b. 4.*

do all things touching the suit, which the constituent himself could do. And we moreover say that an attorney cannot appoint another to act in his place in any cause, until after issue joined, unless authorized to that effect by his letter of attorney. What we here say applies only to attorneys who are empowered to prosecute causes in court. For with regard to attorneys employed to receive money or do any thing else out of court, they may substitute others to act in their stead whenever they think proper, and what is done by the substitute will be as valid as if done by themselves. But if the substitute do any thing to the prejudice of the constituent, then the attorney who appointed him in his place, will be responsible therefor. And we further say, that it will suffice if attorneys who are appointed to transact business out of court be seventeen years of age, while those appointed to prosecute or defend a cause should be at least twenty-five. (1)

LAW 20.

How that may be valid which one person does in the name of another, though he had no letter of attorney to that effect.

No one can sue for any thing in the name of another, without authority from the owner thereof, as we have said in the preceding law. But if any person bring a suit for another as his attorney, and the defendant join issue without questioning the authority of the attorney; and afterwards the person in whose name it was brought, come and ratify what was done; then all that was done in court will be as valid as if the attorney had been authorized to act from the beginning; unless he

(1) *R. laws of the tit. 24. b. 5. C. art. 14, 21 & 22. p. 422 & 424.*

were a slave, or one of those persons prohibited by law from acting as attorney for another. (1)

LAW 21.

In what cases an attorney cannot institute or defend a suit, unless he previously give security.

Attorneys sometimes produce in court, letters of attorney of doubtful import, or so defective and badly executed that it cannot be certainly known whether they are valid or not. And in as much as every thing done before judges must be certain that it may be valid; we say that if any such doubt arise, the attorney ought not to be suffered to institute the suit, unless he previously give security that his constituent will ratify all that he does in the cause. But if the letter of attorney be sufficient, he ought to be permitted to bring the suit; and no other guarantee ought to be demanded of him, or hinderance thrown in his way unless he refuse to furnish security to answer and defend any suit which the other party alleges he intends to bring before the same judge, against his constituent. For it is just, that if he refuse to give security to answer in court for his constituent, that he should be prohibited from bringing any suit for him. What we here say, applies only to the attorney for the plaintiff. But as to the attorneys for the defendant, whether they have sufficient letters of attorney or not, they are always bound to give security, or furnish pledges for the entire performance of what may be decreed in the suits they defend, unless it were expressly declared in the letter of

(1) *R. l. 2. tit. 24. b. 2—ib. l. 3. tit. & l. 10. tit. 17. b. 4—ib. l. 5. tit. 3. b. 5.*

attorney that the constituent himself was his security for the performance or payment of every thing that might be decreed against him ; in which case no further security ought to be required. (1)

LAW 22.

That attorneys ought to answer with certainty to the questions put to them in court ; and if they be unwilling or know not how to answer, then their constituents are bound to do it for them.

Attorneys must answer with certainty, if they can, to the questions put to them in court. And as some of them sometimes maliciously endeavor to prolong a cause by concealing the truth ; we say that in such case, if one of the parties request the judge to cause the other to appear and personally answer the questions, alleging that he is a man of good faith, and will not deny the truth, and that his attorney refuses to do it, or that he is ignorant of the fact, the judge ought to grant the request ; and if the other party were present, to cause him to appear in person before the judge himself, to answer the questions. And if he be elsewhere under the jurisdiction of another judge, then the judge who entertains the cause, ought to order the questions put before him to be committed to writing, and sent under his seal to the judge of the place where the party is whom they wish to question, requesting him to compel such party to appear before him and answer under oath the questions put him, to commit his answers to writing, and send them back enclosed under his seal. And we ordain,

(1) *R. l. 64. tit. 4. b. 2—ib. l. 2. tit. 24. b. 2.*

that the judge to whom such an order is sent, shall execute it accordingly, in the manner above stated. (1)

LAW 23.

When the powers of an attorney expire.

If a party to a cause die before issue joined by his attorney, the power of the attorney is thereby at an end, so that he neither ought nor can proceed any further in the cause. But if he die after issue joined, the attorney does not thereby lose his authority, but he ought to follow up the cause until it is determined, as though his constituent were living, notwithstanding he received no new power from the heirs of the deceased. And we moreover say, that if the attorney die before issue joined, his power is thereby at an end; but if he die afterwards, his heirs may, and ought, if they are capable, finish what he had begun. We also say, that the authority of the attorney expires, whenever the judge renders a final decision in the cause in which he was employed. But when judgment is rendered against him, or his constituent, he ought to appeal, notwithstanding no power to that effect had been given him by his letter of attorney: nevertheless he cannot afterwards prosecute the appeal, unless authorized to that effect by his constituent. The power of the attorney also expires, when his constituent revokes it, and appoints another in his place; or when the attorney himself renounces his power, on account of some legal hinderance of such a nature as to prevent him from exercising it.

(1) *R. l. 14. tit. 8. b. 2—ib. ll. 1 & 2. tit. 7. b. 4.*

LAW 24.

That a party in a cause may dismiss his attorney and appoint another in his place.

If after a man has appointed one attorney especially for any cause, he appoint another in the same suit ; the powers of the first are thereby revoked and conferred on the second. He ought, however, to make it known to the judge or his adversary ; otherwise, all the first attorney does in the cause, will be as valid as though his powers had not been superseded. And we also say, that a party in a cause, may revoke the powers of his first attorney, even after issue joined, and appoint a second, unless the defendant object, alleging that he is not able to contest the suit against so many attorneys ; or unless the attorney should conceive himself dishonored, supposing the revocation were founded on some suspicion entertained of him : for then the constituent ought to verify his suspicions, or openly declare that he did not revoke his powers on that account, and that he had no cause of complaint against his attorney ; and in that way he may dismiss the first attorney and appoint another. And we moreover say, that for any just cause, a party may change his attorney, even after issue joined ; as where he can shew that his first attorney had fallen into the power of the enemy, or were in prison, or had gone on a pilgrimage, or were disabled by sickness, or were employed in the prosecution of his own causes, so that he could not attend to those of his constituent ; or had become his enemy, or the friend of his adversary, by a marriage lately contracted. For these, or any similar reasons, he may dismiss his first attorney and appoint another, notwithstanding the first attorney

or his adversary may object to it. But if issue were not joined in the suit, he might revoke the powers of the first, and appoint another attorney, without assigning any cause therefor. And so we say of the attorney himself; that he may if he choose, relinquish his powers, on account of sickness, or of any other of the causes above mentioned; provided he previously give notice thereof to his constituent.

LAW 25.

That an attorney should render an account of all that he had recovered in the cause, and pay it over to the party by whom he was employed.

In the same manner that an attorney in fact, who is employed to recover any thing out of court, is bound to account therefor to his constituent; so must an attorney at law render to the person who employed him, an account of every thing he had received in the cause in which he was employed. For if the adverse party be condemned to pay the costs and charges, or any thing else, the attorney is bound to pay over to his constituent all he receives on that account, and to transfer to him all rights of whatever nature he had acquired in the cause. We moreover say, that the constituent is bound to reimburse his attorney for all the just and reasonable expenses he had incurred in the prosecution of his suit; unless the attorney had caused or paid them through some error committed by himself; as where he had been sentenced to pay costs, or had incurred any penalty through his own fault or contumacy: for it is but just that every man should sustain the damages caused from his own fault, and not seek

amends therefor from others. But if the attorney had entered into any agreement with his constituent, relative to the expenses of the cause, or the damage that the prosecution of the same might occasion, such agreement we say, ought to be observed.

LAW 26.

That an attorney is bound to indemnify his constituent, for any loss or damage caused by his fault or fraud.

An attorney should be neither neglectful nor indolent in the causes committed to his care; but should follow them up with fidelity and diligence. For if through his fault or fraud the rights of his constituent be lost or impaired, he will be responsible therefor, out of his own effects. But if the cause be lost or injured on any other account without his fault or fraud, he will not be obliged to make any reparation therefor. (1)

LAW 27.

Out of whose estate the judgment rendered against the attorney of the defendant, must be satisfied.

We say that the judgment rendered against the defendant's attorney, in any cause in which he is employed, ought to be satisfied solely out of the effects of his constituent; and if enough of his cannot be found, then out of the effects of the securities given by the defendant's attorney, and not out of those of the attorney himself. But if any one takes upon himself to defend the causes of other persons, without any letter of attorney to that effect, and judgment be rendered against him;

(1) *R. l. 4. tit 24. b. 2—ib. l. 10. tit. 24. b. 2.*

it ought to be satisfied out of his proper effects, or those of his securities, accordingly as they may have obligated themselves, and not out of the effects of the party himself. And if he afterwards demand any thing of the person whose cause he defended, which he alleges he had paid for him in the suit he had lost, such person will not be obliged to pay him. But if he had gained the cause, the party whom he represented, may be compelled to reimburse him, all the costs and charges he had rightfully incurred in defending it : and such party cannot excuse himself by saying that he had not employed him in the cause, nor appointed him his attorney ; in as much as the event had been advantageous to him. (1)

TITLES.

Of the Roman and Spanish Laws which relate to the title
of LAS SIETE PARTIDAS, on Advocates.

Digest, lib. 3. tit. 1. - - *De Postulando.*

Code, lib. 2. tit. 6. - - *De Postulando.*

Code, lib. 2. tit. 7. - - *De Advocatis Diversorum Judicio-*
rum.

Code, lib. 2. tit. 8. - - *De Advocatis Diversorum Judicum:*

Code, lib. 2. tit. 10. - - *De errore Advocatorum, &c.*

Code, lib. 12. tit. 62. - - *De lucris Advocatorum, &c.*

Fuero Real, book 1. tit. 9.

Leyes del Estilo, Laws 18, 19, 20 & 33.

Ordenamiento de Alcala, tit. 3.

Ordenamiento Real, book 2. tit. 16.

Recopilacion de Castilla, book 2. tit. 19.

Recopilacion de las indias, book 2. tit. 24.

Autos Acordados, book 2. tit. 16.

(1) *R. l. 64. tit. 4. b. 2. C. art. 9. p. 320.*

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TITLE VI.

OF ADVOCATES.

LAW 1.

What an advocate is, and why he is so called.

An advocate is he who pleads the causes of others, or his own, before courts of justice, either as plaintiff or defendant. And he is called *Bozero* because it is with his voice or words, that he exercises his profession. (1)

LAW 2.

Who can, and who cannot be an advocate either for himself or for another person.

Every man who from long practice has become learned in the law, in (*fuero*) or usages, (*costumbres*) of the country, may be an advocate for others, unless he were a minor under seventeen years of age, or deaf, or a madman, or an idiot, or interdicted on account of his prodigality : for such persons can neither act as attorney for themselves nor for others. And so we say that a monk or regular canon of a church, labors under the same disability, unless where he acts in behalf of the monasteries or churches where he principally resides, or in behalf of places that appertain to them. (2)

LAW 3.

Who can act as advocate for himself but not for others.

No woman, however learned she may be, can appear in court as an advocate for others, as it is not de-

(1) *R. l. 1. tit. 16. b. 2.*

(2) *R. l. 1. tit. 16. b. 2—ib. l. 3. tit. 1. b. 2.*

cent and becoming, that a woman should take upon herself such a masculine office, and mix and argue publicly with men ; nor can a man blind in both eyes, be an advocate for others ; as he cannot see the judges, nor render them the honors to which they are entitled ; nor can a person upon whom has passed a sentence of adultery, or of treason, or of forgery, or unjustifiable homicide, or any other crime of an equal or higher degree. Nevertheless they may appear as advocates for themselves in prosecution or defence of their rights. (1)

LAW 4.

That they who fight against wild beasts for money, cannot be advocates for others, except in certain cases.

(Not in force.)

LAW 5.

Who can appear as advocates for themselves, but not for other persons, except in certain cases.

Notwithstanding a man's reputation is stained by the commission of any less offence than those spoken of in the third law preceding this ; as if he had been convicted of larceny, or robbery ; or of having practised fraud upon any one, or of doing him an injury or dishonor, as by words or the like ; or of any similar offence by which his character had been injured according to the Fuero of Spain, he may nevertheless act as advocate for himself and for other persons in certain cases : as for his ascendants or descendants in the direct line : or in a suit which interests his brother, sister, wife, father-in-law, mother-in-

(1) *R. ll. 1 & 15, tit. 16. b. 2.*

law, son-in-law, daughter-in-law, or step father; the person who had emancipated him or his children, or the minor under his care. But he cannot appear as the advocate for any other person, notwithstanding he have the consent of the adverse party.

(No other part of this law in force.)

LAW 6.

That the judge ought to appoint an advocate to the party who requests it.

Widows, orphans, and other unfortunate persons sometimes have suits to prosecute or defend in court. And as they may have powerful antagonists to contend against, they may not find advocates who will undertake their cause. We therefore say, that when such persons request it, the judge should appoint them an advocate, who ought to appear in their behalf, for a moderate reward. And if the party be so indigent as not to be able to pay at all, then the judge ought to order the advocate to undertake the cause for the love of God, and he will be bound to do it accordingly: And if the party have wherewith to pay him, he may make an agreement to that effect. (1)

LAW 7.

In what manner an advocate should argue his cause in court, whether he prosecute or defend.

The difference between the manner in which judges and advocates should exercise their respective duties,

(1) *R. ll. 16 & 28. lit. 16. b. 2.*

is, that the advocate should stand up while he argues before the judge, and the judge ought to sit while he gives audience and examines the cause. We therefore say, that when the judge orders the parties to proceed and declare what they have to say, the plaintiff or his advocate ought to rise first, and speak to the cause. And in the commencement he ought to ask the judge and those about him, to lend their attention until he had finished what he had to say. For, as was said by the ancient sages, when a man speaks before others, he loses his time, and what he says will turn to his own confusion, unless he is heard and understood. He must then relate the facts that gave rise to the suit, as they passed, and state his arguments with as much method as possible. And if there are several advocates employed on the same side, they ought to agree upon the manner in which one of them should speak for the others, as one only can speak, and no more. And he should be careful to avoid all superfluous expressions which do not appertain to the cause; and to speak before the judge with mildness and decorum, and not with too loud a voice, nor so low as not to be heard. And when he is done arguing his cause, the advocate of the defendant should rise and state his defence, supporting it by all the reasoning suggested by the nature of the case, in the same manner that the advocate for the plaintiff had done. And during the whole time they are speaking, they should not interrupt one another; nor should they make use in their arguments of any improper or indecent expressions, unless they were necessary and grew out of the cause. And advocates who conduct themselves in this manner ought to be treated with respect, and listened to

by the judge; and he may prohibit those from speaking before him, who conduct themselves otherwise. (1)

LAW 8.

That an advocate may retract what he had said in court, prejudicial to his client, through error.

Advocates should be circumspect in the words and arguments they make use of in court, when they plead in the presence of their client. They ought to reflect attentively before they speak, whether what they are about to say will be advantageous for their client or not, and if it be not advantageous, they should be silent. For every thing that an advocate says in court, in presence of his client, who hears and does not contradict him, has the same effect as if it had come from the mouth of the party himself. And if either the advocate or the party himself say any thing in court, through error, which may be prejudicial to the latter, he may retract it at any stage of the cause, before final judgment, first proving the error into which he had fallen. But he cannot correct the mistake after sentence is rendered, nor be heard to that effect, unless the party were a minor under twenty-five years of age: in that case he may be heard as well after, as before judgment rendered. (2)

LAW 9.

That an advocate ought not to reveal the secrets of his clients cause to the adverse party.

It is right and proper that advocates should keep

(1) *R. l. 29. tit. 5, & ll. 3, 4, 25 & 29. tit. 16. b. 2. Auto 2. tit. 16. b. 2.*

(2) *R. ll. 29 & 59. tit. 5. b. 2.*

the secrets of the causes confided to them by their clients, and not reveal them to the adverse party, nor practise any fraud in any manner whatever, by which their causes may be injured or lost. For when they have once espoused the interest of one party, they cannot afterwards, in any manner, advise or undeceive the other. And we ordain, that every one shall be deemed infamous from the moment it is proved he has violated this law, and shall be forever afterwards incapable of acting either as advocate or counsellor in any cause. He may moreover be fined by the judge of the place according to his discretion, the nature of the cause and the offence committed. And if his client's rights were injured by such fraud, or sentence had been thereby rendered against him upon the same being proved, all that has been done shall be revoked and things placed in the situation in which they were before the fraud was committed. (1)

LAW 10.

Whether he who has appeared as the advocate of one of the parties in a cause, can with propriety afterwards act as the advocate of the other in the same cause.

It sometimes happens that men come and explain the nature and secrets of their causes to an advocate, the better to enable them to obtain his advice and assistance ; and the advocate after being informed fully of the facts, may maliciously refuse to lend his aid, unless for an exorbitant fee. In such case we say, that if the party be willing to pay him a reasonable fee, or to give such security therefor, as according to the opi-

(1) *R. l. 17. tit. 16. b. 2.*

nion of good men will be sufficient, it shall be his duty to aid the party, and faithfully to advise him to the best of his ability. But if any person explain his cause to many advocates with the fraudulent intention of depriving his adversary of their assistance, we command the judge not to suffer him to practice such fraud, but, if the other party require it, to appoint one of those very advocates to assist him, though he may be fully informed of the suit of the adverse party. And we moreover say, that where an advocate is employed by a party whose adversary dies before judgment rendered in the cause, and the same advocate, for any of the reasons mentioned in the laws of this code, which speak of the guardianship of orphans, be appointed guardian to the children of the deceased; he may act as their advocate against the party by whom he had been before employed, and in the same cause. (1)

LAW 11.

For what causes a judge may forever prohibit an advocate from pleading the cause of any other person in court.

If it be proved that a judge has knowingly done any thing contrary to justice, or omitted to do that which the law required of him, in any cause submitted to his decision, he shall be prohibited afterwards from appearing as advocate in any cause whatever: for it is to be presumed that he who knowingly gives an erroneous judgment, will not faithfully defend the interest of his client. And we moreover say, that if a judge pronounce sentence against any advocate by which he

(1) *R. ll. 7 & 10. tit. 16. b. 2.*
vol. 1.

is prohibited from pleading for the future, on account of his bad character or for any other just cause, and no appeal be taken from the sentence, such advocate cannot afterwards plead for any other person, unless for those mentioned above; except the king pardon him, and permit him to pursue his profession as before. (1)

LAW 12.

For what causes judges may prohibit advocates from exercising their profession for a certain time.

If a judge prohibit an advocate from pleading before him during a certain time, for any just cause; as for being too troublesome or contradictory, or for speaking too much, or for other like reason, he cannot afterwards plead any cause, before that judge until the time of his suspension had expired; though he may before any other person delegated by such judge to preside in his place, or before any other judge. (2)

LAW 13.

That no person can practice as an advocate, unless previously authorized to that effect.

They who turn advocates, without understanding the laws and usages that are recognized in courts, are a vexation and hinderance to law suits. We therefore ordain, that henceforth no person shall presume to act as the advocate of another, in any cause, unless previously licensed by the judges and the learned jurists of our courts, or the courts of the realm, or those of

(1) R. ll. 16. 17 & 33. tit. 16. b. 2.

(2) R. ll. 16. 17 & 33. tit. 16. b. 2.

the cities or towns in which he intends to exercise his profession. And if they find him duly qualified, they shall administer to him an oath, to well and faithfully serve every one whom he promises to assist ; and never knowingly to espouse and advocate any iniquitous or unjust cause, or one from which he expects no favorable result : and that he will not designedly procrastinate, but bring to a speedy close, every just cause in which he may be engaged. After which his name shall be enrolled in the book, where are inscribed those of other advocates, who have been in like manner authorized to practice. And whoever shall take upon himself, to plead the cause of another, contrary to our commands, shall not be heard, nor shall the judges permit him to appear before them. (1)

LAW 14.

What reward is due to advocates who faithfully discharge their duty ; and what bargains they are forbidden to make with their clients.

A client ought to be grateful to his advocate, when he had labored faithfully in his cause, and honor and pay him the fee he had stipulated to give him. And as clients, sometimes through anxiety to gain their causes, and sometimes through the artifices of advocates, promise exorbitant fees, or enter into conditions prejudicial to themselves ; we therefore ordain, that the fee of an advocate shall be in proportion to the magnitude of the cause, and the research and labor that it may require ; so that the highest fee shall not

(1) *R. ll. 1 & 2. tit. 16. b. 2. Auto 5. tit. 16. b. 2.*

exceed one hundred meravedis, (*a*) whatever may be the magnitude of the demand ; and below that sum, according to the nature of the suit. We also forbid advocates from agreeing with their clients to receive a part of the thing in dispute. For it was conceived by the ancient sages of the law, that whoever undertook a cause upon such condition, would do every thing to gain it, whether right or wrong. And moreover, if they were permitted to make such agreements, no one could then obtain the assistance of an advocate, under any other condition ; which would be highly unjust and hurtful to society. If therefore, it be proved that an advocate had made such a contract with his client, we ordain that he be afterwards incapable of pleading the causes of other persons ; that he be deemed infamous, and the contract void. (1)

LAW 15.

What penalty an advocate deserves who betrays the cause of his client.

Prevaricator in latin, means in common speech, an advocate who is false to his client : and more particularly when he secretly aids and advises his adversary, at the same time that he makes a shew of defending the interest of the party by whom he is paid, or for whom he had undertaken to plead. Such an advocate we say, shall suffer death as a traitor ; and his estate shall be delivered to the party whose interest he had

[A] Vide hodie, quæ habentur in Ordinat. Advocatum, quæ sunt in Pragmat, ubi alitur taxatur, scilicet, usque ad vegesimam partem valoris litis, et in causis criminalibus usque ad triginta mille morapetinos hodiernos.—Note by Greg Lopez.

(1) *R. ll.* 9. 10. 11. 12. 18. 19 & 20. *tit.* 16 *b.* 2.

betrayed, as an indemnity for the loss and damage he has sustained in the cause. We also say, that an advocate who knowingly induces his client to make use of forged writings and false witnesses, shall be punished in like manner. And we further say, that an advocate should be careful not to promise his client to gain any cause committed to his care: for if he afterwards lose it, he will be bound to pay the party all the loss and damages he had thereby sustained, as well as all the expenses he had incurred in prosecuting the suit. (1) (A)

TITLES

Of the Roman and Spanish Laws which relate to the title
of LAS SIETE PARTIDAS, on Citations.

Digest, lib. 2. tit. 4. - - *De in jus vocando.*

Code, lib. 2. tit. 2. - - - *De in jus vocando.*

Fuero Real, book 2. tit. 3.

Leyes del Estilo, Laws 21. 22. 23. 25. &c.

Ordenamiento de Alcala, tit. 2.

Ordenamiento Real, book 2. tit. 2.

Recopilacion de Castila, book 4. tit. 3.

OF CITATIONS.

What a citation is, who can serve it and how, - - - LAW 1

That those who are cited ought to appear before
the judge, and who may be cited, and who not, 2

That women who lead a virtuous life at home, can-
not be cited to appear personally before a judge, 3

(A) Some parts of this law being in force and others not, we have thought it best to translate it entire.

(1) *R. ll. 3, 6 & 17. tit. 16. b. 2.*

- That children cannot cite their parents to appear
in court, nor freedmen those by whom they were
enfranchized, - - - - - LAW 4
- What penalty the freedman deserves who cites
him who enfranchized him, without the permis-
sion of the judge, - - - - - 5
- That a woman cannot be cited before the judge,
who wishes to violate or marry her, against her
consent, - - - - - 6
- That the parties may agree between themselves
upon a further delay, after they are cited, - - 7
- What penalty he deserves who refuses to appear
when cited, - - - - - 8
- What the judge deserves who refuses to issue a ci-
tation, and prolongs the suit at the instance of
one of the parties, - - - - - 9
- How long those who are summoned ought to wait
for their adversaries at the king's court, over
and above the time fixed by the citation, - - - 10
- That the person summoned may be excused, on
shewing a good reason why he did not appear, - 11
- That they who are cited, are not dispensed from
answering before the judge by whom they were
summoned, by afterwards changing their resi-
dence to another place, - - - - - 12
- What penalty he deserves who sells the thing for
which he is summoned, - - - - - 13
- When a thing for which a citation has issued may
be afterwards sold, without incurring any penalty, 14
- How the judge ought to proceed against those who
fraudulently sell the thing before they are cited
for the same, - - - - - 15
- If a man sell or give away his right to any thing,
before or after he is cited therefor, to a person
rendered more powerful than himself, in virtue

of some office which he holds, such transfer will
 not be valid, - - - - - LAW 16
 That a testator may, if he choose, bequeath by will
 any claim he has against another, to a person
 more powerful than himself, - - - - - 17

TITLE VII.

OF CITATIONS, (*Emplazamientos.*)

LAW 1.

What a citation is, who can serve it and how.
 (Not in force)

LAW 2.

*That those that are cited ought to appear before the judge;
 and who may be cited and who not.*
 (Not in force.)

LAW 3.

*That women who lead a virtuous life at home, cannot be cited
 to appear personally before the judge.*
 (Not in force.)

LAW 4.

*That children cannot cite their parents to appear in court, nor
 freedmen those by whom they were enfranchized.*
 (Not in force.)

LAW 5.

*What penalty the freedman deserves who cites him who enfran-
 chised him, without the permission of the judge.*
 (Not in force.)

LAW 6.

*That a woman cannot be cited before the judge who wishes to
 violate, or marry her, against her consent.*
 (Not in force.)

LAW 7.

That the parties may agree between themselves upon a further delay, after they are cited.

(Not in force.)

LAW 8.

What penalty he deserves who refuses to appear when cited.

(Not in force.)

LAW 9.

What penalty the judge deserves who refuses to issue a citation, and prolongs the suit at the instance of one of the parties.

(Not in force.)

LAW 10.

How long those who are summoned ought to wait for their adversaries at the king's court, over and above the time fixed by the citation.

(Not in force.)

LAW 11.

That the person summoned may be excused, on shewing a good reason why he did not appear.

(Not in force.)

LAW 12.

That they who are cited, are not dispensed from answering before the judge by whom they were summoned, by afterwards changing their residence to another place.

If a person be once cited before a judge who has jurisdiction over him, he cannot excuse himself from answering to the citation, by afterwards removing, and fixing his residence within another jurisdiction. And so we say of those who are cited, when they wish to go into the public schools, or on a pilgrimage, or on a mission for the king, or for his council, or for any like

cause. For they cannot on that account be excused from answering either in person or by attorney, before the judge who cited them : and if they do not answer, the judge may proceed against them as for contumacy. (1)

LAW 13.

What penalty he deserves who sells the thing for which he is summoned.

It often happens that they who are cited, sell the thing for which they are sued, in order to defraud the plaintiff ; and when they afterwards appear in court, say they are not bound to answer to the demand, because they are no longer in possession of the thing. To the end therefore that such fraud may not prevail, we ordain that if any one shall, after citation, alienate the thing in dispute, and which is claimed by the plaintiff, such alienation shall be void, and the thing shall be restored to the alienor who shall render a just account thereof : And we moreover say, that the purchaser shall, if he knew of the fraud, lose the price he had given for it, and the seller pay the same amount out of his own effects, as a fine to the king. But if the buyer was ignorant of the fraud and had bought the thing in good faith, the price ought to be refunded to him, and the seller pay him moreover, as a penalty, one third of its value, and the other two thirds to the king. And so if he had exchanged the thing after citation, the person with whom he effected the exchange, shall, if he knew of the fraud, pay to the king the value of the thing in dispute ; the defendant shall likewise pay him the same

(1) *R. l. 7. tit. 3. b. 4.*

sum out of his own effects, and the exchange shall be void. And so it would be if he had made a donation of the thing in dispute, after citation. But if the person who received the exchange or donation were ignorant of the fraud he will not be bound to pay any penalty : nevertheless we say, that both the exchange and donation shall be void. And we moreover ordain, that the defendant who after citation, maliciously exchanges or donates the thing for which he is sued, shall pay the person with whom he effected the exchange, or to whom he made the donation, the third part of the value of the thing and the other two thirds to the king. And the same penalty that is incurred by the defendant who sells a thing for which he is sued after citation, and by him who buys it; the same penalty we say, shall in like manner be incurred by the plaintiff who fraudulently sells after citation, the thing for which he has brought the suit, and by him who buys it of him. For neither the plaintiff or defendant ought to, or can alienate in any manner, the thing which they respectively claim, after a citation is issued touching the same, as we have above said, until final judgment rendered thereon, or the defendant be discharged.

LAW 14.

When a thing, for which a citation has issued, may be afterwards sold without incurring any penalty.

Though we have said in the preceding law, that a thing for which a citation has issued, cannot be sold until judgment be rendered thereon ; yet it is otherwise in certain cases. The first is, where a thing is given to any one after citation as a marriage portion.

The second, where it belongs to several co-proprietors who sell some of them to the others : but in that case the purchaser will be obliged to answer to the suit in which the citation had issued. The third, where the thing is alienated after citation, in virtue of a legacy made at the death of one of the claimants. But in this last case, the heir of the testator will be bound to defend and follow up the cause until final judgment. And if he gains it, he must deliver up the thing to the legatee ; and if he lose it without his fault or fraud, he will not be bound to deliver any thing else in its stead. And we also say, that if the legatee of the thing in dispute, suspect that the heir will not follow up the cause in good faith, he may if he desire it, join him in the defence.

LAW 15.

How the judge ought to proceed against those who fraudulently sell the thing before they are cited for the same.

Kings and other lords who hold the place of the deity upon earth, should above all other things, labour to maintain justice, and to prevent wicked men from defeating the ends of the law. We therefore say, that if any one, under the apprehension that another intends to cite him for a thing that he has in his possession, alienate it before he is cited, to a person more powerful, artful, or obstinate than himself, or who resides in another country, in order to throw difficulties in the way of his adversary ; such fraud we say shall not avail him ; and it shall be at the option of the plaintiff to bring the suit against him for the thing, as though it were yet in his power, or against the person to whom

he sold it, as well as for all the losses and damages he may have thereby sustained.

LAW 16.

If a man sell or give away his right to any thing, before or after he is cited therefor, to a person rendered more powerful than himself, in virtue of some office which he holds, such transfer will not be valid.

Not only are defendants forward to commit fraud, as we have said in the preceeding law, but plaintiffs likewise : it is therefore our duty to be vigilant in frustrating their wicked designs also. Hence we say, that if the plaintiff, whether before or after he cites his adversary in court, transfers the claim he has against him either by sale, exchange, donation, or in any other similar manner to another person rendered more powerful than himself in virtue of some office which he holds ; such transfer shall not be valid, and the defendant will not be bound to answer him who so acquired it : and the plaintiff shall moreover lose all his right against his adversary in the cause in which he had alienated the thing. But if the plaintiff had, before he cited his adversary, alienated, abandoned and truly conveyed all his right to the thing, to any one else, not more powerful than himself ; such alienation we say will be valid, as it would appear to have been done without fraud. But after he had once cited his adversary, he could not afterwards, though he wished it, transfer his interest in the cause, even to a person not more powerful than himself, unless in those cases mentioned in law 14 of this title.

LAW 17.

That a testator may, if he choose bequeath by will any claim he has against another, to a person more powerful than himself.

We ought not to presume that a man who is about to die, would unjustly bequeath any thing by will that would prejudice others, or endanger his soul. And although we said in the preceding law, that no one could transfer his claim against another, either by sale, exchange, or in any other manner, to a person more powerful than himself, in virtue of some office which he held : nevertheless, we say he may do it by will or by legacy : and the heir or legatee may bring suit upon the claim after the death of the testator, in the same manner that the testator himself could, were he living ; unless the testator had already commenced the suit before his death, by citation or otherwise ; for then the heir is bound to follow it up, until final judgment : and whatever he gains thereby, he shall give to the legatee, according to the instructions of the testator.

TITLE VIII.

Of putting the Plaintiff in possession of the Defendant's property, (assentamientos.) (A.)

(A) This title relates to the compulsory process by which the plaintiff is put into possession of the property of the defendant, who refuses to appear in court upon citation. As no part of it is in force it is not therefore translated.

TITLES,

Of the Spanish Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on Sequestration.

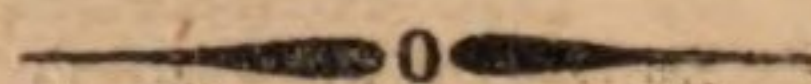
Ordenamiento Real, book 3. tit. 10.

Recopilacion de Castilla, book 4. tit. 12.

Civil Code, book 3. tit. 11. chap. 3. p. 415.

OF SEQUESTRATION.

For what causes a thing in the possession of another, may be put into the hands of a sequestrator, and who may be a sequestrator, - - - - - LAW 1
How long the sequestrator ought to keep the thing confided to him, - - - - - 2



TITLE IX.

When the thing in dispute ought to be put in the hands of a sequestrator, (Fiel.)

LAW 1.

For what causes a thing in the possession of another, may be put into the hands of a sequestrator ; and who may be a sequestrator.

There are six causes and no more, for which a thing in dispute between the plaintiff and defendant ought to be put into judicial deposite, (*fielddad*) called in Latin, *sequestratio*. The first is by agreement of both parties. In that case the sequestrator must take care of the thing and deliver it in the manner prescribed to him. The second is where the thing in dispute is moveable, and the defendant be a suspected person, who it is feared, will transport it elsewhere, deteriorate,

or ill treat it. The third is where a definitive judgment is rendered concerning the thing in dispute, against the party in possession, who thereupon appeals. For he ought to be immediately dispossessed of it, when it is suspected he will destroy or waste the fruits of it : and the judge ought to cause it to be put into the hands of a sequestrator (*Fiel*,) who will take care of it, and receive its fruits and rents until the court of appeals shall finally decree to whom it shall be delivered, together with its fruits. The fourth is where a husband mismanages and dissipates the property of his wife, who is already threatened with poverty ; for she may then petition the judge to take from her husband, her dotal and paraphernal estate, and put them into her possession, or under the care of a sequestrator ; and to deliver to him or herself, the fruits arising therefrom, for her maintenance : and the judge ought to order it accordingly. The fifth is where a person who has two children, forgets to mention one of them in his will, or if he mentions him, or disinherits him, without a just cause, and gives all the estate to the other. For the disinherited son may demand of his brother, the share to which he is entitled of his father's or mother's estate, by offering to divide with him all the gains he had made therefrom ; or if it were a daughter, by offering to collate the dowry she had received at her marriage, or to deduct it from her share of the inheritance, she giving security at the same time to her brother, to render a faithful account, whenever the partition takes place, of all she had received : they may then share with their brother in the partition of the estate. But if the latter then refuse to

let them divide with him, the share falling to the disinherited child ought to be placed in the hands of a sequestrator, to keep and receive the fruits thereof. And the judge ought to fix a certain time for the gains or dowry to be produced ; and if they be accordingly produced at the expiration of the time, he shall order the child producing them, to be put into possession of his portion of the estate, and the fruits arising from the same. But if they are not produced in time, he shall order the whole to be delivered up to the brother who was instituted heir thereto. The sixth is where any one who is held in slavery, brings a suit against the person who holds him, and obtains a judgment decreeing his freedom. After which a dispute arises between them, relative to property found in his possession; the former master asserting it to be his, and that he had given it to the other, as his slave, who on his part denies the fact, and contends that the property was acquired by himself. In this case, it ought to be put in sequestration, until it can be known to which of them it really belongs. We moreover say, that those into whose hands judges order property to be sequestered, ought to be good honest men, possessing an estate in the country, so that no suspicion of fraud may arise against them, or that they will transport elsewhere, or waste the thing committed to their care. (1)

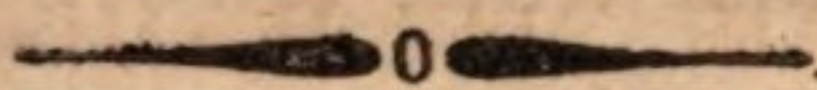
LAW 2.

How long the sequestrator ought to keep the thing confided to him.

The sequestrator ought to keep the thing in dispute

(1) *R. l. 1. tit. 4 & ll. 2 & 3. ttt. 16. b. 5. C. art. 35. 42. p. 416 & 418.*

in his possession, as long as he is instructed so to do by the judge, or as was agreed upon by the parties, when the deposit was made. And during that time, he should do nothing that may operate to the advantage or disadvantage of either party, by causing them to gain or lose the thing by prescription : unless it had been expressly agreed by the parties when the thing was put into the hands of the sequestrator, that the time it remained in deposit should turn to the profit of one of them ; for then it may avail the party in whose behalf the stipulation was made, agreeably to their contract. (1)



TITLES,

Of the Roman and Spanish Laws which relate to the title of LAS SIETE PARTIDAS, which treats of the manner in which suits must be commenced by petition and answer.

Code, lib. 3. tit. 9. - - *De litis Contestatione.*

Fuero Real, book 2. tit. 6.

Leyes del Estilo, law 75.

Ordenamiento de Alcala, tit. 7.

Ordenamiento Real, book 3. tit. 3.

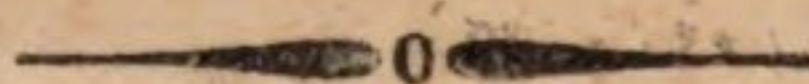
Recopilacion de Castilla, book 4. tit. 4.

How suits ought to be commenced by petition and answer.

Of the questions which may be put by either the plaintiff or defendant, before the suit is begun, by petition and answer, - - - - - LAW 1

(1) *R. l. 2. tit. 16. l. 5.*

When the defendant can retract the answer he has made to questions put to him, before issue joined in the cause, - - - - -	LAW 2
What suits must be commenced by petition and answer, - - - - -	3
When several suits are instituted by the same parties before the judge, which of them ought to be first determined, - - - - -	4
In what instances the cause of the defendant ought to be decided before that of the plaintiff, - - - -	5
Where two persons sue for the same thing, which of them ought to be first heard, - - - - -	6
What demands ought to be joined together in the same action, - - - - -	7
What force a cause has when once begun by petition and answer, - - - - -	8



TITLE X.

How suits ought to be commenced by petition and answer.

LAW 1.

Of the questions which may be put by either the plaintiff or defendant, before the suit is begun by petition and answer.

(Not in force.)

LAW 2.

When the defendant can retract the answer he has made to questions put to him before issue joined in the cause.

But if either of the parties answer, after issue joined in a cause, to any questions put to him, he cannot retract it afterwards, unless he allege that he answered through error, as is explained in titles 12 and 13 of this Partida, concerning the questions and confessions put

and made by the parties after issue joined by petition and answer. (1)

(No other part of this law in force.)

LAW 3.

That suits ought to be commenced by petition and answer.

The commencement and foundation of every cause upon which judgment ought to be rendered, are the petition (*demanda*) and answer, (*respuesta*) presented to the judge. And this is done by the plaintiff making his demand either verbally or in writing, in the manner we have explained in those laws which speak of plaintiff and defendant. To this the defendant must answer directly, yea or nay. But if he should answer in the name of another, as his attorney, or in quality of heir to some other person; it will be a sufficient commencement of the suit, if he answers and says that he neither knows nor believes what is contained in the petition, to be as is therein alleged. And if the plaintiff brings several suits, either in writing or verbally, the defendant ought to distinctly answer each of them separately, unless he wish to confess or deny them altogether. The defendant may also if he choose deny the demand in the following words: "I deny
' that the things contained in my adversaries petition,
' are as he alleges them to be; wherefore I say, that
' what he demands ought not to be granted to him." And in whichever of these ways the defendant may reply to the demand, the suit is considered as commenced by petition and answer, which is called in Latin *contestatio*. (2)

(1) *R. l. 14. tit. 8. b. 2.*

(2) *R. l. 1. tit. 2. & l. 1. tit. 4. b. 4.*

LAW 4.

When several suits are instituted by the same parties before the judge, which of them ought to be first determined.

(Not in force.)

LAW 5.

In what instances the cause of the defendant ought to be decided before that of the plaintiff.

Where the plaintiff brings a suit for debt, or for any other cause of action ; it often happens that the defendant replies that the plaintiff is his or some other persons slave ; that the suit is of such a nature as not to be instituted by a slave, and that he is therefore not bound to answer. In this and other similar cases, the judge ought first to determine whether the plaintiff be a slave or a freeman. And if he be determined to be free, he may proceed to hear his cause ; but if a slave, no further proceeding can be had therein. And we further say, that where a man brings a suit for an inheritance or any thing else, and the defendant alleges that he is not bound to answer, because the plaintiff had forcibly deprived him of some of his property : such forcible deprivation should be previously inquired into, before the first cause can be tried. And if the allegations of the defendant, be found true, he ought to be reinstated in the possession of all the property of which he had been deprived ; after which he may answer to the petition of the plaintiff. But if the defendant does not set up such forcible deprivation as a defence, but by way of cross-action, then the judge may entertain both causes at the same time ; so that the cause of the party who first cited the other, shall be tried

first, provided both parties complain of a forcible deprivation of property. But if the defendant had been sued for a thing claimed by the plaintiff, or to which he set up some right ; or for something which he had obligated himself to give or to do, and he were afterwards to institute a suit in his turn, against the plaintiff, for something of which he complained he had been forcibly evicted by him ; the question of eviction shall be first tried. And it is just it should be so ; because violence springs from great cupidity and presumption ; wherefore the judge ought first to repress it, and render justice to the person evicted ; and afterwards to cause him to answer to the petition upon which he was cited. (1)

LAW 6.

Where two persons sue for the same thing, which of them ought to be first heard.

It may happen that two persons bring suit against the same defendant for the same or several things. If for the same thing, the defendant is bound to answer him who first cited him, and the other afterwards. And if the first plaintiff gain the cause, the defendant will not be obliged to deliver him the thing, unless he previously give security to defend him against the claim of the other. (2) But if both bring their suit at the same time, then the judge may first hear him, who he thinks has the best right, and afterwards the other. But if the suit were founded upon debt, or a contract which the defendant has contracted with them, both at dif-

(1) *R. l. 1. tit. 5. b. 4.*

(2) *R. ll. 2. 3, tit. 4. b. 4.*

ferent times, then we say he is bound first to answer him to whom he had first contracted the debt or obligation.

(No other part of this law is in force.)

LAW 7.

What demands ought to be joined together in the same action.

The plaintiff may join several demands together in the same action, if they be not repugnant to one another : otherwise he cannot. As where a slave had employed any one to purchase a house, vineyard, or any other thing, with the money he had stolen from his master ; and the person employed make the purchase accordingly, knowing the money to have been stolen. In that case, the master may bring against such person, two actions which would be repugnant to each other. For he may sue for the money received from his slave, by which he would renounce any right to the thing purchased, under the orders of his slave : or, if he choose, he may ratify the purchase made with his money, and claim the thing itself of the person who bought it. This last action is repugnant to the first : for by it, the plaintiff takes on his own account, the purchase made under the orders of his slave : Therefore, he cannot maintain both actions, and claim the money stolen from him and likewise the thing which had been bought with it : but he must select one of them only, choosing that which he thinks most advantageous to him ; after which he cannot have recourse to the other. So it would be where any one buys a thing belonging to a third person, without the knowledge of the owner ; for the owner may then sue for the thing itself if he were not pleased with the sale :

or if he choose to ratify the sale, he may sue for the price for which the thing was sold. But he cannot sue for both of them, as the claims would be repugnant to each other. And so we say of all other demands of this nature. Likewise when one sues for a house, vineyard, or any other inheritance which he claims, and the defendant in possession disputes the claim, and before the suit be determined, institutes another against the plaintiff, to compel him to open a road through another estate contiguous to that which is in dispute, to enable him to enter upon the latter: such suit cannot be brought by the defendant, unless it were previously determined that the estate in dispute belonged to him. For no one can claim a service upon the estate of another, unless he shew that the estate in favor of which he claimed it was his, or that he had some right to it. We also say, that if any one bring suit for the partition of an estate, or any thing else, which he claims in common with the defendant, either by inheritance, partnership, or in any other way, and the defendant who is in possession of the whole, deny that he is either his partner or co-heir, or that he is entitled to any part of the estate; no further proceedings can be had until the plaintiff establish his right as co-proprietor, after which his claim of partition may be heard. But if the plaintiff be in possession of the thing, for the partition of which he sues, his claim may be heard, notwithstanding the defendant should deny he were his partner, or were entitled to any part of the thing. But the plaintiff will be bound to prove the right he has in the thing; whereupon the judge will order the parti-

tion to be made. But if he is unable to prove his right, he shall be deprived of the possession of the thing, and it delivered to the defendant. (1)

LAW 8.

What effect a suit has after it is commenced by petition and answer.

Many advantages arise from a suit once commenced by petition and answer. For the judge may then take the oath of the parties that they will proceed in the cause in good faith: and by this means the truth concerning the matter in dispute, may be more speedily discovered. Also witnesses may be then heard, which could not be previously done, except in certain cases, which will be mentioned in the laws that speak of witnesses; and the judge may then render a final judgment, which he could not do before issue joined. Moreover, such commencement of the suit interrupts all prescription, by which the thing in dispute might be acquired or lost. And if the thing be of such a nature as to be lost by the prescription of one year and a day, or any less time, and a petition or demand therefor were presented to the king who answered to the same, it would have the effect to prevent the thing from being lost by such prescription, in the same manner as if the suit had been commenced before the judge. We moreover say, that after issue joined, neither of the parties can recuse the judge on account of suspicion, or for any other cause, unless the suspicion or cause of recusation had been recently discovered, and were of such a nature as ought to be allowed. And

(1) *R. see the laws of the title 2. b. 4.*

we moreover say that the plaintiff or defendant, if they acted either as guardian of an orphan, or as attorney for another, may after issue joined, appoint other attorneys to appear for them in the same cause, although no power had been given them to that effect by the parties ; which they could not do before issue joined, as we have shewn in the title which speaks of attorneys. (1)

TITLES,

Of the Roman and Spanish Laws and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, which treats of the Oaths administered at the instance of one of the parties in a cause after issue joined.

Digest, lib. 12. tit. 2. - - *De jure jurando, &c.*

Digest, lib. 12. tit. 3. - - *De in litem jurando.*

Code, lib. 4. tit. 1. - - - *De rebus creditis & jure jurando.*

Code, lib. 2. tit. 59. - - *De jure jurando propter calumniam dando.*

Code, lib. 5. tit. 53. - - *De in litem jurando.*

Leyes del Estilo, Laws 136. 240. 249.

Recopilacion de Castilla, book 4. tit. 7.

Civil Code, book 3. tit. 3. ch. 6. sec. 5. p. 316.

Of the Oaths administered at the instance of the parties in a cause after issue joined.

What an oath is, and about what it may be taken. (a) LAW 1

(A) The other laws of this title relate to the various oaths which the parties in a cause, may verbally tender to one another, after issue joined, or which may be tendered to them by the judge, all of which having been repealed by the provisions of the civil code, p. 316, are not therefore translated.

(1) *R. l. 14. tit. 8. b. 2—ib. ll. 1 & 2. tit. 2 & ll. 1. 2. 3. tit. 4. b. 4.*

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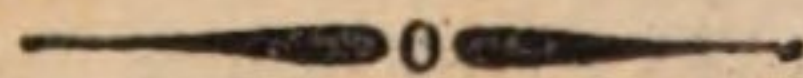
TITLE XI.

Of the oaths administered at the instance of the parties in a cause, after issue joined.

LAW 1.

What an oath is, and about what it may be taken.

An oath is a verification made by calling upon God or some other sacred thing, that what a person declares is, or is not so. Or an oath may be said to be an affirmation of the truth, and has been invented in order that they who are unwilling to believe, because of the impossibility of producing proof, might be moved to believe that which was supported by an oath. And when we say that witnesses ought to swear by some sacred thing, we do not intend either heaven or earth, or any creature whether living or dead : but primarily by God ; then by the holy virgin his mother, or by some one of the saints, sanctified by holiness received from God ; or by the holy evangelist, in which are contained the words and deeds of God ; or by the cross upon which he was placed ; or by the altar, because it was consecrated by the body of our lord Jesus Christ ; or by the church, because it is there God is worshipped and adored. (1)



TITLE XII.

Of the questions which the judge may put to the parties in court, after issue joined, and which in latin are called positiones. (A)

(A) The laws of this title being also repealed by the provisions of the civil code p. 316, are not therefore translated.

(1) *R. l. 10. tit. 1. b. 1—ib. l. 5. tit. 7. b. 4.*

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, which treats of the confessions and answers of the parties, made in court, to the questions put touching the matter in dispute between them.

Digest, lib. 42. tit. 2. - - *De Confessis.*

Code, lib. 7. tit. 59. *De Confessis.*

Fuero Real, book 2. tit. 7.

Las Leyes del Estilo, law 133.

Recopilacion de Castilla, book 2. tit. 5. law 6.

Civil Code, book 3. tit. 3. ch. 6. sec. 4. p. 314.

Of the Confessions and Answers of the parties made in court, to the questions put touching the matter in dispute between them.

What is meant by confession, and who can make it, LAW	1
What is the force of a confession, - - - - -	2
How many kinds of confession there are, and how they are made, - - - - -	3
Under what circumstances a judicial confession is binding, - - - - -	4
That a confession made through compulsion or mistake is not valid; and within what time it may be revoked, - - - - -	5
A confession which is not definite, and which is contrary to nature or the laws of this code, is not valid, - - - - -	6
What confessions made out of court, are not valid,	7

TITLE XIII.

Of the confessions and answers of the parties, made in court, to the questions put, touching the matter in dispute between them.

LAW 1.

What is meant by confession, and who can make it.

Confession is the answer which one party makes to the other in court, by which he acknowledges something to be true. It may be made by every man of twenty-five years of age, or by his attorney or advocate, authorised to that effect. But if an attorney admit anything in court, in presence of his client, who immediately contradicts him, the latter shall not be prejudiced thereby. But if he were not present when the admission was made, he cannot afterwards retract it, unless he can prove that his attorney had made the admission through error or fraud, and that the fact was otherwise than as by him stated to be: for by proving this before final judgment is rendered in the cause, he will not be prejudiced by the admission. We moreover say, that the confession of a minor made in court, out of the presence of his guardian, shall work no injury to him: but if his guardian were present and did not contradict him, it will be binding. But if the minor were greatly injured by such confession, he may retract it through the indulgence of the king or judge before whom it was made, on shewing the damage he would sustain, unless the cause were placed in the same state it was before the confession was made. And if the king or judge be of opinion that the minor will be greatly

prejudiced thereby, they ought to permit him to retract the confession. And they may extend the same indulgence to all minors under twenty-five years of age, who are, together with their estates under the power of another; and even to persons of full age, who are madmen, idiots or interdicted prodigals, whenever their guardians admit any thing in court that may greatly turn to their prejudice. (1)

LAW 2.

What is the force of a confession.

The confession which a party makes in court in presence of his adversary, has great force: for by it a cause may be as effectually decided, as if the fact confessed had been proved by credible witnesses, or by authentic writings. And the judge before whom it is made, may immediately thereupon, render final judgment, if the parties had already joined issue, upon the matter confessed. (2)

(No other part of this law in force.)

LAW 3.

How many kinds of confessions there are, and how they are made.

There are three kinds of confessions: the first is that which a party makes in court, in presence of his adversary, of which we spoke in the preceding law: the second is, that which one person makes to another, without compulsion, out of court: the third is, where any one confesses when compelled by force or torture. Of each

(1) *R. l. 14. tit. 8. b. 2—ib. l. 2. tit. 7, & l. 5. tit. 21 b. 4.*

(2) *R. l. 14. tit. 8. b. 2—ib. l. 2. tit. 7, & l. 5. tit. 21. b. 4.*

of these we shall fully treat in the laws of this title. But we may here observe, that all those who are interrogated in court, must answer without evasion to the questions put them, confessing or denying plainly the thing about which they are interrogated. And we also say, that where any one is questioned by the judge concerning any thing appertaining to the cause, and he be obstinate and refuse to answer, such refusal shall prejudice him in the same manner as if he had confessed the fact upon which he had been interrogated. And so it would be where he answered so obscurely that he could not be understood. (1)

(No other part of this law is in force.)

LAW 4.

Under what circumstances a judicial confession is binding.

Many things are necessary to a judicial confession, that it may prejudice the party who makes it, and turn to the profit of his adversary. They are these: it must be made by a person of full age, as we have above said; of his own accord, and not through compulsion; knowingly, and not through mistake, and against himself: for if he declare any thing favorable to his own interest, it cannot prejudice his adversary unless it be proved. Moreover the confession must be certain as to the thing, quantity, or fact to which it relates, and not repugnant to nature or the laws of this code. And above all it must be made in court, in presence of the adverse party or his attorney. When all these things concur, the confession will be valid;

(1) *R. l.* 14. *tit.* 8. *b.* 2—*ib.* *ll.* 1 & 2. *tit.* 7. *b.* 4. *C. art.* 261. *p.* 316.

and if any one of them be wanting, it cannot prejudice the party by whom it was made. (1)

LAW 5.

That a confession made through compulsion or mistake, is not valid ; and within what time it may be revoked.

Men sometimes through fear of torture, wounds, death, or disgrace of character, confess things which they would not have voluntarily acknowledged. Wherefore we say, that such confessions are not valid, nor can they prejudice the person by whom they are made. But if any one be tortured into a confession, and he afterwards, without restraint or menace, and of his own free will, repeat the same confession, and persevere therein, it will be as valid as if he had made it without any compulsion whatever. We also say, that if any one confess or deny any thing in court, through error, it shall not prejudice him, if he prove his error at any time before final judgment in the cause. For afterwards the mistake cannot be rectified, unless for some of the reasons we shall mention in the title on judgments, and of which we have spoken in the title of defendants in those laws which treat of that matter. When, therefore, the testamentary heir to an estate, is sued by one who alleges that the deceased left him by will a portion of his estate, and the heir believing it to be so, acknowledges it ; and afterwards when the will is opened, it should appear that nothing had been bequeathed to the plaintiff : if such or any similar mistake be proved before final judgment rendered in the cause, the confession may be revoked, and will remain

(1) *R. l. 14. tit. 8. b. 2—ib. ll. 1. & 2. tit. 7. & l. 5. tit. 21. b. 4.*

without effect. Or if the suit were brought against the heir for a debt or any particular thing which the plaintiff alleged was due him from the testator; and the heir believing it to be true, either from the reputable character of the plaintiff, or from writing which he exhibited, acknowledge the justness of his claim: and he can afterwards prove at any time before final judgment rendered, that the debt had been paid by his testator, the heir shall not be prejudiced by the acknowledgment he had made or any other similar to it. (1)

(No other part of this law in force.)

LAW 6.

A confession which is not definite, or which is contrary to nature or the laws of this code, is not valid.

If a party confess in court that he owes an uncertain or indeterminate quantity or thing, such confession cannot work to his prejudice. As where the plaintiff claims a hundred maravedis which he says he had lent; and the defendant reply that he owes him a sum in maravedis, but does not say how much: or if the plaintiff claim any particular thing, as a field or vineyard in such a place, and the defendant answers that he owes him a vineyard or a field, but does not say what vineyard or field: such or any similar acknowledgement, cannot prejudice him. But the judge ought to compel him to answer specifically, what sum, or what field or vineyard he owes. And we say, that this law applies in every case where a similar confession is made. And we moreover say, that if one make a confession in court, contrary to nature, it will not prejudice him, nor will it be valid.

(1) *R. l. 1. tit. 5. b. 4.*

As if he should acknowledge that a person older than himself, were his son or grandson ; such acknowledgment would be of no avail, as the father must naturally be older than his son. And so if any one confess he had done a thing which in truth he could not have done ; his confession shall not prejudice him. As where a child confess that he had committed adultery before he was of sufficient age : or where a person of sufficient age make the same confession when there was no one with whom he could have committed it. We also say, that if a person who was really free, should acknowledge in court that he was a slave at a time when no suit existed against him, claiming him as a slave ; such acknowledgment will not prejudice him, nor will it be valid. But if he had made the acknowledgment of his own accord and without restraint, at a time when there existed a suit claiming him as a slave, it would operate to his prejudice. Yet if before final judgment he prove by authentic writings or by witnesses, that he is free, he will not be barred by his confession, for he will be presumed to have made it through error. We also say, that a confession made repugnant to the laws of this code, will be of no avail. As when a christian acknowledges in court, that he is the slave of a Moor or Jew, or that he had married a Jewess : such confessions will not prejudice him, as they are contrary to the provisions of this code, as we shall shew in those titles which speak of that matter. We likewise say, that if a man marry a woman publicly, and then one of the spouses make any confession with a view to dissolve the marriage ; such confession will be of no avail

unless its truth be proved by witnesses or some other means. (1)

LAW 7.

What confessions made out of court, are not valid.

If a man confess out of court, that he had committed any crime upon another, or had done him any injury, and when he is afterwards sued therefor, he deny that he had committed any such crime ; we say that if it cannot be proved by any other means, his confession shall not prejudice him ; although strong suspicions may exist of the truth of the fact or thing he had confessed. We also say, that if any one acknowledge out of court, that he owed a sum of money or other thing to a third person, without specifying the consideration for which he owed it ; such acknowledgment shall not prejudice him, nor can he be compelled to pay, unless he to whom he made the acknowledgment, prove a legal consideration for the debt. But if any one acknowledge that he owed a third person a particular sum of money or thing, and mention the consideration for which he owed it, saying, " I acknowledge that I owe such a one, such a sum of money which he lent me, or such a thing which he gave me to keep," or mention some other just consideration, in presence of the adverse party or his attorney ; in such case we say, that his acknowledgment will be valid, and he will be bound to pay accordingly, unless he can prove by legal writings or credible witnesses that he had since paid the debt or thing which he had acknowledged to

(1) *R. ll. 2 & 3. tit. 1. b. 2.*

be due ; or that he had been released from paying it by a person who had the power to do so, and who had agreed never to demand it of him again, or who acknowledged that he had been already paid. (1)

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on proofs and presumptions concerning things that are disputed or doubtful.

Digest lib. 22. tit. 3. - - - - *De probationibus & præsumptionibus.*

Code, lib. 4. tit. 19. - - - - *De probationibus.*

Fuero Viejo, book 3. tit. 2.

Fuero Real, book 2. tit. 8.

Las Leyes del Estilo, ll. 176, 181.

Ordenamiento de Alcala, tit. 8.

Ordenamiento Real, book 3. tit. 11.

Recopilacion de Castilla, book 4. tit. 6.

Civil Code, book 3. tit. 3. chap. 6. p. 304, &c.

Of the proofs produced, and the presumptions raised in court, concerning things that are disputed or doubtful.

What proof is, and who is to produce it, - - - - LAW 1

A party is not bound to prove what he denies, except in certain cases, - - - - 2

When the father leaves by will to his natural children more than the laws of this code permit him, 3

When one of the parties alleges in court, that his adversary is a minor, and the latter deny it, which of them is bound to prove it, - - - - 4

(1) *R. l. 2. tit. 16. b. 5. C. art. 256. p. 314.*

- When a party in a cause, alleges that his adversary
is a slave, who replies that he is free, which of
them is bound to prove what he alleges, - - - - LAW 5
- When one alleges he has paid money through mis-
take, which he did not owe, who is bound to pro-
duce proof thereof, - - - - - 6
- To whom, and of what proof ought to be produced, 7
- How many kinds of proof there are, - - - - - 8
- That a woman who declares she is not pregnant by
her husband but by another man, does not there-
by raise any presumption that shall prejudice the
unborn child, - - - - - 9
- That a person who proves he has at any time been
the owner or possessor of the thing in dispute,
is still presumed to be so, until the contrary is
proved, - - - - - 10
- That all contracts which men enter into, are pre-
sumed to extend to their heirs, though no men-
tion be made of them, - - - - - 11
- That in criminal causes proof cannot be made by
presumption, except in certain cases, - - - - 12
- That there are causes which cannot be determined
by proof, until the judge has personally inspected
the thing in dispute, - - - - - 13
- How in cases of doubt, proof is to be made of the
death of a person in a foreign country, - - - - 14
- That the matter in dispute may be proved by laws
or the customs of the realm, - - - - - 15

TITLE XIV.

Of the proofs produced and the presumptions raised in court, concerning things that are disputed or doubtful.

LAW 1.

What proof is, and who is to produce it.

Proof is the verification in court, of some thing that is doubtful. And when the defendant denies the demand, thing or fact upon which he is interrogated, it is incumbent on the plaintiff to prove them. For if he does not, the defendant will be discharged of what is not proved against him. And a party is not bound to prove what he denies; for a negative cannot, in the nature of things, be shewn or proved. Wherefore, that which is denied in court, ought not, nor cannot, be proved by the party denying it, unless in the manner hereafter explained in the laws of this title. (1)

LAW 2.

A party is not bound to prove what he denies, except in certain cases.

It is a known rule of law, that the party who denies a thing in court, is not bound to prove it, as we have above shewn. Nevertheless there are certain exceptions to this rule. As where a party alleges that his antagonist cannot appear as an advocate; or that a

(1) *R. see the laws of the tit. 6. b. 4.—ib. l. 14. tit. 8. b. 2. C. art. 215. p. 304.*

witness produced by him is incompetent ; or that the person who hears them, is prohibited by law from being a judge. In these and other similar cases, it is incumbent on such party to prove the fact, to produce his reasons, or shew the law which disqualifies the advocate, witness or judge, to whom he objects. And the adverse party against whom such a negative exception is taken, is not bound to prove that those persons are competent to appear in court ; for the exception does not amount to an absolute negative, but includes the affirmation of some fact which is alleged to have disqualified the advocate, witness or judge. And so we say it would be where any one sues for an inheritance, or legacy, or any other thing left him by will, and produces in support of his claim, a will made in proper form ; and the other party objects to the introduction of it, alleging that the testator was not of sound memory at the time he made it. The party who makes the allegation will then be bound to prove it, though made in a negative form. And this the ancient sages of the law thought just ; because they presumed every man to be of sound memory and understanding, until the contrary were shewn. And if no proof be produced of the want of memory in the testator, the testament will be valid, if no other objection be raised against it, notwithstanding the party who avails himself of it, does not shew the sanity of the testator's mind at the time he made it. And we moreover say, that if upon the death of the husband, money, clothes, or any other thing be found in possession of his wife, with whom he usually lived, and they be sued for by the heirs of the deceased, and the wife

deny in court that they belonged to her husband, and claim them as her own, or as having some right to them ; she will, in that case, be bound to prove what she alleges, and if she cannot, the whole ought to be delivered to the heirs of the deceased ; which was thought just by the sages of the law, because every thing found in possession of the wife is presumed to belong to the husband until she prove to the contrary ; and because it is more reasonable to presume that she had them of her husband, than that she had acquired them by illicit means. And this provision of law applies to every wife who does not exercise a trade or profession by which she could have honestly acquired the property she possesses. But if she does exercise such trade or profession, she ought not to be deprived of what she alleges she had thereby acquired ; but both her pretensions, and those of the heirs, ought to be heard in the manner prescribed in the laws of this title, which speak of that matter. (1)

LAW 3.

When the father leaves by will, to his natural children, more than the laws of this code permit him.

So great is the love of the father, even for his illegitimate children, that he is ever forward to devise the means to give them by will, more than is permitted by the laws of this code. As where he bequeaths to one of them as much as the law allows, and by the same will, commands his heirs to pay him a sum of money, which he declares such a relation of the illegi-

(1) *R. see the laws of the title 5 & 8. b. 4.—ib. l. 14. tit. 8. b. 2.—ib. l. 1. tit. 9. b. 5. C. art. 67. p. 336.*

itimate child gave him to keep for such child, or to pay him such a sum of money, which he declares he received from the sale of the fruits of the estate of such child, or of the estate of his mother ; or makes by will any other similar disposition, with a view to give such child, more than the law allows him to give. In these cases we say, that the heirs will not be bound to give more than the law permits the father to bequeath to such child, and that for a greater sum, no faith ought to be put in the declarations of the testator ; for such declarations are presumed not to be true by the ancient sages, who are the authors of the laws, but to have been made rather with a view to favor his illegitimate children, and defeat the operations of the law. Yet if the illegitimate child can prove that his father was indebted to him, or had received for him any of the things he had ordered to be given to him ; the heirs will be bound to deliver to such child, all he can prove to be due. (1)

LAW 4.

When one of the parties alleges in court, that his adversary is a minor, and the latter deny it, which of them is bound to prove it.

The orphan sometimes endeavours to free himself from the power of his guardian, and get possession of his estate, by pretending he has arrived at full age. If the fact be disputed by the guardian, it will be incumbent on the orphan to shew that he has arrived at the age of majority. And so we say it would be where

(1) *R. l. 10. tit. 6. b. 5—see ib. the laws of the title 8. b. 5. C. art. 205. p. 194 & 17; p. 212.*

the guardian petitioned the judge to release the orphan from his custody, alleging that he was of full age: if the orphan or any other person for him, dispute the fact, it will be incumbent on the guardian to prove it. We moreover say, that if any one wish to rescind or annul a sale, or other contract or obligation he had entered into, by pretending that he was a minor at the time he obligated himself: or that he had been injured or defrauded thereby, and the defendant dispute what he alleges; it will be incumbent on the plaintiff to prove two things: first that he was a minor at the time he contracted the obligation; and secondly, that he was defrauded or greatly damaged thereby: for unless he proves both these things, the obligation cannot be rescinded: (1)

LAW 5.

When a party in a cause alleges that his adversary is a slave, who replies that he is free, which of them is bound to prove what he alleges.

Disputes sometimes arise in court between the plaintiff and defendant, the one alleging that his adversary is a slave, who in turn denies it and asserts that he is free. And as the judge in that case may doubt which of them is bound to produce proof of what he affirms; we say, that where the plaintiff claims as his slave the defendant who is in the enjoyment of his liberty, and who replies that he is free; that it will be incumbent on the plaintiff, to prove what he alleges, and not the de-

(1) *R. l. 1. tit. 5. b. 4.*

fendant who is in possession of his freedom, unless he choose. But where the plaintiff in a cause alleges that he is free, and brings a suit for his freedom against his master, who holds him in his power, and claims him as his slave; and the master produce any title, document or other proof, to shew that he had possession of the plaintiff in good faith, and not by force or fraud; it will then be incumbent on the plaintiff to prove that he is free, or that the master had taken possession of him by force or fraud: for if he can prove neither, he ought to remain a slave in the power of his master, as the latter had shewn a just title to the possession of him. (1)

LAW 6.

When a man alleges that he has paid money through error, which he did not owe, who is bound to produce proof thereof.

Men sometimes make payment in money or other thing, and afterwards bring suit to recover it back, alleging that they had paid through error, what they did not owe; and the defendant replies that the debt was actually due and properly paid. And as doubts may arise which of them is bound to produce the necessary proof, we say that it is incumbent on the plaintiff to shew the error through which he paid what he did not owe. For the sages of the law presumed that no man is so unmindful of his own interest, as to give or pay to another, what he did not owe. But if the plaintiff were a military man employed in the service of the king or other great lord; or were engaged in deeds of

(1) *R. l. 1. tit. 5. b. 4.*

arms, or of knighthood ; or were a simple husbandman who lived in the country, ignorant of the law ; or a minor under fourteen years of age, or a woman ; these will not be bound to prove the error they allege, but their adversaries who had been paid, must prove that what they had received, was really due ; otherwise they will be obliged to reimburse what had been so received. For we may presume that they received what was not due, as military men are much better skilled in deeds of arms than in frauds and deceptions ; and because the other persons above enumerated are simple and uninformed, and for that reason may have erroneously paid what they did not owe. And we moreover say, that if any person, whether woman or man, receive in payment a sum of money or any other thing, and a suit be brought to recover back what they had so received, under pretence it had been paid through error, and the defendant positively deny that any payment was ever made ; if then the plaintiff prove it, though he does not shew the error through which he paid what he did not owe ; the defendant will be obliged to return to the plaintiff, what the latter proves he had paid, or to shew that he really owed what he had paid. (1)

LAW 7.

To whom, and of what proof ought to be produced.

Proof, of whatever nature it may be, must be exhibited to the judge before whom the cause is tried, and

(1) *C. art. 10 p. 320.*

not to the adverse party, but in his presence, and a copy of it given to him if he require it. We also say, the proof must relate to things that may be the subject of judicial decision, as moveables or immoveables, liberty or slavery, possession or right of property, a pledge, an office or honors, or the guardianship of minors, or crimes committed by other persons, or any other thing whatever, that may be the object of a suit. For no proof can be heard concerning questions of philosophy, as they cannot be discussed in the *forum*, nor determined by courts, but by those whose profession it is to understand and explain those things. We also say, that no proof can be heard except that which is pertinent to the main cause of action: for the judge ought not to permit the parties to waste their time vainly, in proving that which can avail them nothing after they had proved it. (1)

LAW 8.

How many kinds of proof there are.

There are various kinds of proof by which men may support their pretensions: as by the confession of a party against himself, made either in, or out of court, in the manner we have before shewn in the laws which treated of that matter; or by witnesses who concur as to the fact, and who, on account of their character, or from the nature of their testimony, are free from reproach: or by writings executed by the hand of a notary public; or by any legal credible evidence, as will be fully explained in the laws of this title. There is also another kind of proof called presumption; that

(1) R. See the laws of the tit. 6. b. 4,

is to say, a strong suspicion which in some cases has the same force as complete proof. And although King Solomon founded upon presumption only, the judgment which he gave between the free woman and slave, who disputed for the child ; (a) yet no cause can be decided by signs and presumptions only, except in those cases prescribed in this code : for presumptions are not always consistent with the truth. There is likewise another kind of proof, as the inspection of the thing in dispute by the judge ; as where the parties dispute about the limits of towns or other places ; or where the suit is concerning a woman, who says she was ravished, or who alleges that she is pregnant by her

(A) There are many other decisions of a nature similar to that rendered by Solomon. Puffendorf, in his treatise on the law of nature and nations, enumerates the following : “ And so Claudius in Sueton, brought a woman to own her son, whom she first on probable arguments denied, by commanding her to marry him. Thus a father and son being arraigned together, for murder of a priest, when it could not be made out which of the two had committed the fact, each refusing to accuse the other ; Charlemagne, as we are told, gave sentence of death upon them both ; upon which the father confessed himself the murderer. So it being a law in Spain, that in case a female slave be with child by her master, she shall be immediately restored to her liberty. Once it happened that a nobleman’s maid, was discovered to be in this condition ; the nobleman denied the thing, and the proofs alleged not being evident, King Alphonso ordered the child to be publicly sold into servitude ; the news of which sentence moved the father to discover himself. So when Nellus being about to lead abroad a colony, was commanded by the soothsayers to purge his army of all polluted persons ; he pretended that he himself had murdered a child, and stood in need of expiation ; and by this means persuading others to confess themselves, he left all those behind, whom he had thus convicted of impurity.” — Puff. b. 4. ch. 1. p. 328.

deceased husband. Such disputes ought to be decided by the inspection of respectable matrons. There is also a kind of proof arising from hearsay, or from the laws or customs which the parties cite in court in support of their respective petitions, as we shall hereafter shew. And there was anciently, and still is used another mode of proof, that of single combat between knights, and of battle by duel or otherwise, between foot soldiers. And although this mode of proof is observed in other countries, yet the sages of the law never considered it as legal proof for two reasons. The one because it frequently happens, that falsehood triumphs over truth. The other, because he who ventures upon such proof, tempts the Deity, which is forbidden by his own words, where he says, "get behind me Satan, thou shalt not tempt God thy Lord."

(1)

LAW 9.

That a woman who declares she is not pregnant by her husband, but by another man, does not thereby raise any presumption that can prejudice the unborn child.

Wives are sometimes so strongly moved by resentment against their husbands, as to declare that the latter are not the fathers of the children they bear in their wombs, or of those that are already born, but that other persons are. In such case we say, that if it can be proved by the neighbors of the place, that the child of any woman who makes such declarations, was born during her marriage with her husband, and with-

(1) *R. l. 5. tit. 21 & l. 13. tit. 25. b. 4—ib. l. 2. tit. 16. b. 5—see the laws of the title 6. b. 4. Auto 2. tit. 8. b. 8.*

out his having been absent from her, so long a time as to raise a presumption, that in the course of nature another person must have been its father: then such declarations made by either father or mother, shall not operate to disinherit the child, nor prejudice it in any manner whatever. (1)

LAW 10.

That a person who proves he has, at any time, been the owner or possessor of the thing in dispute, is still presumed to be so, until the contrary is proved.

Where a man brings a suit for a house, vineyard, or any thing else, whether moveable or immoveable, and his claim is disputed by the defendant in possession; it will suffice for the plaintiff to prove, that the thing belonged either to his father or grandfather, or to any person to whom he is heir; and it ought then to be delivered up to him. For it was presumed by the ancient sages of the law, that he who was once owner of a thing, continued to be so, until the contrary was proved. We also say, that if any one be in possession of a thing, for which he is sued, whether moveable or immoveable, and not wishing to enter into any contest about it, he answer that he was not in possession of it, at the time the suit was instituted, he cannot be compelled to defend the cause, although it may have been in his possession at some former time; unless it be proved that he had fraudulently dispossessed himself of it, in order to avoid a suit, or that he had obtained possession of it by force, robbery or fraud: for then he will be bound to defend the cause, in the same

(1) C. art. 7, p. 44.

manner as if he were in possession of it, as we have shewn in the laws of this code, which treat of that matter. But if the party, who proves that he was once in possession of a thing, alleges and admits that he still is, we ought to presume it to be so, until the contrary be proved. We likewise say, that he who was once in possession of a thing which had been pledged or loaned to him, or given him to take care of, is always presumed to continue in possession, though he deny it, until he prove that he had returned or delivered it to the person from whom he received it, or his attorney ; or that he had been deprived of it by theft, force or robbery, or by some other means ; in which case, he will not be bound to pay its value, unless the plaintiff shew he had lost it by his own fault or fraud ; for then he will be bound to pay for it, as we have shewn in the laws of this code which treat of that matter.

LAW 11.

That all contracts which men enter into are presumed to extend to their heirs, though no mention be made of them.

When a man makes an agreement with his debtor, and promises never to claim a debt which he owes him ; and after the death of the debtor, the same debt is demanded of his heirs, who reply that they are not bound to pay it, because the plaintiff had promised their ancestor never to demand it of him, and the plaintiff admit that he had made such a promise, but that it was intended as a personal favor to the debtor only, and that his heirs could not profit by it, as no mention was made of them : in that case we say, that the heirs may avail themselves of the promise, though no mention had been made of them. For the ancient sages pre-

sumed that every man who made an agreement, contracted as well for his heirs as himself, though they were not mentioned in the contract. But if the plaintiff can prove that no mention was made of the heirs, in order to prevent them from availing themselves of the contract, and with a view solely to favor the deceased by not demanding the debt of him during his life time ; in that case, the heirs cannot protect themselves under the agreement but will be obliged to pay the debt, unless they can defend themselves on some other legal ground. (1)

LAW 12.

That in criminal causes, proof cannot be made by presumption, except in certain cases.

(Not in force.)

LAW 13.

That there are causes which cannot be determined by proof, until the judge has personally inspected the thing in dispute.

(Not in force.)

LAW 14.

How, in cases of doubt, proof is to be made of the death of a person in a foreign country.

As doubts may sometimes exist, whether a person who is gone to a distant country, be living or dead and disputes hence arise relative to his estate, between his relations ; the nearest of whom, and those who are entitled to inherit, alleging that he is dead, and others on the contrary contending that he is still living : we

(1) *R. l. 2. tit. 16. b. 5.*

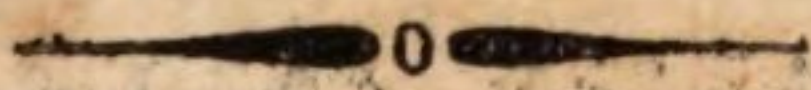
therefore propose here to explain the nature of the proof the judge ought to receive in such a case. And we say, that when it is alleged of a person whose death is doubtful, that he died in a distant country, and that a long time had since elapsed, as ten years or more ; it will be sufficient to prove that he is publicly reported to be dead among the inhabitants of the place. For witnesses cannot be easily obtained to prove a fact which had occurred in so distant a country, and so long since, and still less to prove that they had actually witnessed the death and interment of the deceased. But if they who say he is dead, allege that he had died within a short time, as five years ; or in a country where proof could be easily obtained of the fact ; then it ought to be proved by those who were present at his death and interment, and mere hearsay will not suffice.

LAW 15.

That the matter in dispute may be proved by laws or the customs of the realm.

Not only may the contestations between the parties be decided by their confessions, by witnesses, valid writings, privileges, public writings, presumptions or common report as we have above said ; but also by the laws and customs of the realm, by which the matter in dispute may be verified. We therefore ordain, that every law of this code which a party cites before a judge to prove and support his cause, shall, if applicable thereto, have full force and effect. And if he cite the laws of any other country foreign to our own, we command that they have no force in this kingdom, unless between persons of that country, touching an agree-

ment made, or concerning some moveable or immoveable thing situated there. For then the judges of our kingdom may, notwithstanding the parties are strangers, receive proof, and verify and determine the cause, according to the laws and customs of such foreign countries. We also say, that if any contract, agreement, donation or crime which had been entered into or committed at a time when the former laws were in force, should become the object of a suit under the new laws which were contrary to the former; in such case the cause ought to be proved and determined according to the former law and not the new. Because the time at which the contract was begun and finished, or the crime committed, ought ever to be regarded, and not the period at which the suit is instituted. (1)



TITLES,

Of the Roman and Spanish Laws, which relate to the title of LAS SIETE PARTIDAS, which treats of delays (*plazos*.)

Digest, lib. 2. tit. 12. - - *De Feriis et dilationibus*.

Code, lib. 3. tit. 11. - - *De Dilationibus*.

Leyes del Estilo, law 119.

Ordenamiento Real, book 3. tit. 6.

Recopilacion de Castilla, book 4. tit. 6. ll. 1. 2. 3. 4.

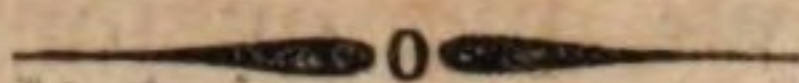
Of the delays which the judges ought to grant to the parties, to enable them to obtain proof in support of their respective rights.

What is meant by delays, and for what purpose

they have been devised, - - - - - LAW 1

(1) *R. l. 3. tit. 1. b. 2.*

Who can grant delays, when they can be granted,
 in what manner, and to whom, - - - - - LAW 2
 How many delays ought to be granted to the parties,
 and for how long a time each, - - - - - 3



TITLE XV.

Of the delays (de las plazos) which the judges ought to grant to the parties to enable them to obtain proof in support of their respective rights.

LAW 1.

What is meant by delays, (plazos) and for what purpose they have been devised.

Delays are certain periods of time, which the judge grants to the parties to answer, or to prove what they allege, when it is denied. And they were devised, in order that the parties might procure the assistance of advocates, or might have time to consider of the answer they should make to the petition, by confessing or denying it, as they believed to be right: or in order to procure the witnesses, privileges, or documents necessary in their respective causes: or to interpose an appeal, or to do and perform whatever may be required of them by the judge. (1)

LAW 2.

Who can grant delays, when they can be granted, in what manner, and to whom.

The judge ought to grant time to the respective parties, to prove what they allege, when it is denied,

(1) *R. l. 3, tit. 3. b. 4.*

both of them being present before him, and he in the place where he usually hears and determines causes. And he shall not only grant time to the plaintiff, and accuser, but likewise to the defendant and accused, if necessary, that they may prove any fact in support of their defence. And we say, that during the delay granted to either of the parties, no further proceeding can be had in the cause, unless concerning the matter which gave rise to the delay, as hearing witnesses, or examining the privileges and papers produced by the parties. (1)

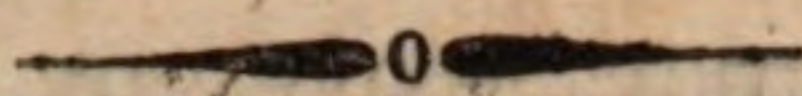
LAW 3.

How many delays ought to be granted to the parties, and for how long a time each.

Each party may have three delays or terms to produce in court his documents or witnesses, to establish his claim to a moveable or immoveable thing. And the judge ought not to grant such delays, at the will of the parties, but only when there exists reasonable cause therefor, as is explained in this law. The first should be granted of course; but not the second or third, unless the party who applies for it, prove forthwith, the hinderance by which he was prevented from producing the proof within the first and second delays which had been granted him for that purpose. Nevertheless, in cases of great necessity, a fourth delay may be granted by the judge, on the party's mak-oath, and previously proving the hinderance by which he had been prevented from producing his proof within the other three that had been allowed him. And

(1) *R. 11. 1. 2. 3 & 5. tit. 6. b. 4.*

each delay ought to be of the length of time we have mentioned in the title of witnesses, in those laws which speak of that matter. (1)



TITLES,

Of the Roman and Spanish Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on Witnesses.

Digest, lib. 22. tit. 5. - - *De testibus.*

Code, lib. 4. tit. 20. - - - *De testibus.*

Fuero Juzgo, book 2. tit. 4.

Fuero Real, book 2. tit. 8.

Leyes del Estilo, ll. 64. 96. 115, &c.

Recopilacion de Castilla, b. 4. tit. 6.

Civil Code, book 3. tit. 3. ch. 6. sec. 2. p. 310.

OF WITNESSES.

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That in general inquests, witnesses may be heard before suit is begun by petition and answer, - -	3
That there are other cases in which the testimony of witnesses, may be taken before suit is begun, by petition and answer, - - - - -	4
That there are other cases in which the testimony of witnesses may be taken before suit is begun, -	5
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(1) *R. l. 1. tit. 6. b. 4.*

Other cases in which witnesses may be heard before suit brought, - - - - -	LAW 7
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That slaves cannot be witnesses, except in cases of treason against the king or kingdom ; and when they may give testimony against their masters, - - - - -	13
In what cases ascendants may give testimony for their descendants, - - - - -	14
That the wife cannot be a witness for her husband, nor the husband for his wife, nor the brother for his brother, while they are under the control of their father, - - - - -	15
The father and children who live together in the same house, or brothers under the paternal authority, may testify in causes wherein they are not parties, - - - - -	16
That a woman who enjoys a good character, may be a witness, - - - - -	17
That no one can give evidence in his own cause, nor can they who are under his control, be witnesses for him, - - - - -	18
That the vender cannot give evidence concerning the thing sold, nor the judge in a cause tried before him, - - - - -	19
That neither advocates nor attorneys, nor guardians of minors, can be witnesses for their clients	

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Why they who are partners in trade, or in any thing else, cannot be witnesses for one another, -	21
Persons in enmity with each other, or who are un- known to the judge or the party against whom they are produced, cannot be witnesses. - - - -	22
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What time shall be allowed to those who have wit- nesses to produce, - - - - -	33
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That the judge ought to compel unwilling witnesses to appear and give their testimony, - - - - -	LAW 35
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When witnesses differ among themselves, the judge ought to give credit to those whose testimony is most consistent with the fact, - - - - -	41
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TITLE XVI.

OF WITNESSES.

LAW 1.

*What are witnesses, the advantages arising from their testi-
mony, and who may produce them before the judges.*

Witnesses are persons of both sexes, free from all exceptions, who are produced in court by the parties, to prove whatever is disputed or doubtful. And hence great advantages arise; for by their testimony the

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truth may be known, which would otherwise often remain concealed. They may be brought into court, either by the parties themselves or their attornies, if they deem it necessary for the support of their cause: for no one can be compelled to produce witnesses to testify against himself. (1)

(No other part of this law in force.)

LAW 2.

That witnesses are to be heard after the cause is begun by petition and answer.

Witnesses cannot be heard until after the suit is begun by petition and answer, unless in particular cases, wherein, if they are not heard before, the rights of the parties might be lost. As where they upon whom the parties relied to prove their claims, were so old or infirm that there were apprehensions of their dying before their testimony could be taken. Or when they are about to set out to join the army, or to go on a pilgrimage, or to any other place to stay so long a time, that it were doubtful whether they would return. In either of these cases, their testimony may be taken before the suit is begun by answer. But the judge who takes it ought previously to notify the adverse party, if he were in the place, that he might, if he choose be present at their examination. And if he did not choose to come, or were not in the place, the judge ought nevertheless to proceed to take their testimony, swearing the witnesses in the presence of good men, writing down what they say, and sealing it up with his seal, that it may be safely kept until it should

1) R. See the laws of the title 6. b. 4.

be wanted. We also say, that if he against whom the testimony was taken, was not then in the country, the other party must notify him of it, within one year if he return ; or to bring his suit within that time for the thing concerning which the testimony was taken. And if he suffer the year to elapse without doing either, the testimony of the witnesses so taken shall no longer be of any effect. Yet if the witnesses were still alive and the plaintiff wish to produce them personally to prove his claim, the defendant cannot prevent it, under pretence that their testimony had already been taken and was of no avail, because not notified to him within one year, as is above said. (1)

(No other part of this law is in force.)

LAW 3.

That in general inquests, witnesses may be heard before suit is begun by petition and answer.

(Not in force.)

LAW 4.

That there are other cases in which the testimony of witnesses may be taken before suit is begun by petition and answer.

(Not in force.)

LAW 5.

That there are other cases in which the testimony of witnesses may be taken before suit is begun.

(Not in force.)

LAW 6.

That there are other cases in which witnesses may be heard before suit is brought.

And we also say, that there are other cases in which

(1) R. l. 14. tit. 8. b. 2—16. see the laws of the title 6. b. 4.

witnesses may be heard before suit is commenced. As where a party sets up a claim and summons his adversary, but does not afterwards follow up his suit, nor appear at the time appointed by the judge who has to decide the dispute; and the defendant fearing that some damage might hence arise to him or his heirs, applies to the king, or to the judge who has cognizance of the matter, and requires that his witnesses should be heard and the cause decided. He ought then to call upon the plaintiff, if he be in the place, or can be found, and appoint a day on which he shall prosecute his suit; and if he were not in the place, he ought to be notified at his house. And if notwithstanding, he does not appear, the witnesses may be heard and the cause determined as justice may require. For a man may be suspected to act maliciously, who summons his adversary, and is not afterwards willing to follow up his suit. (1)

(The only part of this law which appears to be in force.)

LAW 7.

Other cases in which witnesses may be heard before suit brought.

(Not in force.)

LAW 8.

Who are they that cannot be witnesses against others.

Every person of good character, who is not prohibited by the laws of this code, may be a witness in or out of court. And they who are prohibited are the following:—A man notoriously of infamous cha-

(1) *R. l. 64. tit. 4. b. 2—ib. ll. 10 & 11. tit. 7. b. 3.*

racter, cannot be a witness in any cause. (a) A person convicted of perjury ; of falsifying any writing or seal, or of counterfeiting the king's coin ; or having received money not to testify to the truth ; or of having given poisonous herbs to any one with a view to kill him, or do him other bodily harm ; or to cause a pregnant woman to miscarry ; or of having killed any one, except in his own defence : or if he has forced a woman, whether he carried her off or not. Nor can a traitor be a witness ; or a madman, or a fool, so long as their folly continues ; or a thief or robber, (A) (1)

LAW 9.

How old witnesses ought to be.

And in all suits not of a criminal nature ; as for debt, for property whether moveable or immoveable, or for an inheritance, he who has attained fourteen years of age complete, may be a witness. And not only may he testify to what he has seen and known since he arrived at that age, but to what he had seen and known before, if he remember it sufficiently well. (2)

(No other part of this law in force.)

LAW 10.

Who they are that cannot give testimony against others in criminal cases.

(Not in force.)

(a) Intellige de infamia juris.—Note by Gomez.

(A) It being doubtful whether these provisions of this law were in force, it was thought best to translate them.

(1) *R. ll. 1 & 2. tit. 8. b. 4. C. art. 248. p. 312.*

(2) *C. art. 248. p. 312.*

LAW 11.

Who they are that cannot be compelled to appear and give testimony against one another in criminal cases,

(Not in force.)

LAW 12.

In what manner the testimony of one who has been a slave, and since become free, should have effect.

(Not in force.)

LAW 13.

That slaves cannot be witnesses except in cases of treason against the king or kingdom; and when they may give testimony against their masters.

(Not in force.)

LAW 14.

In what cases ascendants may give testimony for their descendants.

Neither the father or grandfather, nor other ascendants in the right line, can give testimony for their children, or grand children, or other descendants in the same line. Nor can the descendants give testimony for their descendants. But if a dispute arose concerning the age of any descendant, or concerning the degree of his relationship; the father or mother, the grandfather or grandmother, may give their testimony in such case. And we moreover say, that the father may be a witness to the will made by his son who is in the army, or on an excursion against the enemy. (1)

(1) C. art. 248. ff. 312.

LAW 15.

That the wife cannot be a witness for her husband, nor the husband for his wife ; nor the brother for his brother, while they are under the control of their father.

The wife cannot give evidence for or against her husband, nor the husband for or against his wife in any cause where they are plaintiff or defendant. (1)

(No other part of this law in force.)

LAW 16.

That father and children who live together in the same house, or brothers under the paternal authority, may testify in causes wherein they are not parties.

And he in whose favor they testify shall not be prejudiced from the circumstance of their living together, or being of the same family at the time they give evidence.

(No other part of this law in force.)

LAW 17.

That a woman who enjoys a good character, may be a witness.

A woman who enjoys a good character may be a witness in every cause, except it be concerning a will. And so we say of an hermaphrodite, unless its nature partake more of the male than female, in which case, if it be of good reputation, it may be a witness in causes concerning wills. (2)

(No other part of this law in force.)

LAW 18.

That no one can give evidence, in his own cause, nor can they who are under his control, be witnesses for him.

No one can be a witness in his own cause ; as it

(1) C. art. 248. p. 312.

(2) C. art. 248. p. 312.

would be both unreasonable and unjust, that a person should be a party and witness at the same time. But in suits which concern the council of a city, a monastery, or conventional church, the members of the corporation, of the monastery or church may be witnesses. For although the matter may concern them all in common, yet it does not appertain entirely to one of them: it ought not therefore to be presumed that good men who give evidence in such cases, would hazard the welfare of their souls by testifying falsely in favor of others. (1.)

LAW 19.

That the vender cannot give evidence concerning the thing sold; nor the judge in a cause tried before him.

Where a man buys a field, vineyard, or any thing else, and a suit be brought therefor, he cannot make a witness of his vender; because the suit equally interests both of them, and because the vender is bound in guarantee to his purchaser. And we moreover say, that a judge cannot be a witness in a suit which he has already decided, or which he had to decide; but he may give evidence as to what passed before him, as judge, when thereto required by the king, or the superior judges who have cognizance of the appeal.

LAW 20.

That neither advocates nor attorneys, nor guardians of minors can be witnesses for their clients or pupils, whether they are plaintiffs or defendants.

An advocate cannot be a witness in a cause he has undertaken to defend, unless the adverse party choose to make him one. And we also say, that neither attor-

(1) C. art. 248. p. 312.

neys, nor the guardians of minors, can be witnesses in the causes of those whom they represent, whether as plaintiff or defendant.

LAW 21.

Why they who are partners in trade, or in any thing else, cannot be witnesses for one another.

Where a suit is instituted for any thing owned in common by partners in trade, or partners in any other way, they cannot be witnesses for one another, because they are each of them interested for his part in the event of the suit. But in causes which do not concern their common interest, they may give testimony for one another, notwithstanding they are partners and friends.

(No other part of this law in force.)

LAW 22.

Persons at enmity with each other, or who are unknown to the judge, or the party against whom they are produced, cannot be witnesses.

(Not in force.)

LAW 23.

In what manner the judge should receive the testimony of witnesses.

The judge should cause witnesses to be sworn before he hears their testimony : and the oath must be administered to them, in presence of the adverse party who ought to be previously notified of the particular day when he might come and see them sworn. And if he contemptuously refuse to attend after being notified, the judge ought nevertheless to proceed and swear

them and take their testimony. We moreover say, that no witness can be heard without being sworn, otherwise his testimony will be of no effect; unless the parties agree to dispense with swearing him, and trust to his veracity: or unless the suit were brought by the wife, praying to be put into possession of the estate of her deceased husband, by whom she alleged she was pregnant, and the judge thereupon appoint skilful matrons to examine whether she were pregnant or not, and report their opinion to him. In that case it will not be necessary to swear the matrons, but it will suffice if they simply declare whether they think her pregnant or not. And although they found their testimony on belief only, it will be sufficient, as they can only testify from what they see. (1)

LAW 24.

In what manner witnesses should be sworn when they are about to be questioned concerning any fact.

The witness should be sworn before the judge in the following manner: he must put his hands upon the holy evangelist, and swear that he will speak the truth of what he knows in the suit in which he is called, as well for one party as the other, without colour of falsehood; and that he will not conceal or withhold the truth, neither through affection, hatred or fear, nor for any reward which had been given or promised him, or any loss or profit he expected therefrom; and that he will declare all he knows concerning the matter, without being thereto interrogated by the judge.

(1) *R. l. 8. tit. 6. b. 4.*

And all these things he should swear by God and the saints and the words that are written in the holy evangelist. (1)

(No other part of this law in force.)

LAW 25.

What witnesses should swear to, who are called on to testify in inquests held by the king, or by other persons under his command.

(Not in force.)

LAW 26.

How the judge ought to interrogate the witnesses, after they are sworn.

(Not in force.)

LAW 27.

That where the witnesses upon whom a party relies to prove his claim, reside in another place, the judge who has cognizance of the cause, ought to send a commission (su carta) to the judge of that place, to take their testimony.

It sometime happens that the witnesses upon whom a party relies to support his cause, are not in the place where the suit is instituted. We therefore say; that the judge ought to send a commission (*su carta*) to the judge of the place where the witnesses reside, requiring him to take their testimony, to write it down, and seal it with his seal, in such manner that neither of the parties can know what they have said; and when he had done this, to send it back to him. And we ordain that it shall be the duty of the judge of the place where the witnesses reside, to execute the commission accordingly. (2)

(No other part of this law in force.)

(1) *R. l. 8. tit. 6. b. 4.*

(2) *R. l. 8. tit. 6. b. 4.*

LAW 28.

In what manner witnesses are to be interrogated, and when their testimony will be legal.

When a witness is questioned why and how he knows what he testifies to ; if he answer, that he knows it, because he was present when the contract was entered into, or the thing done, and that he saw it done, his testimony will be valid. But if he says he heard it from another, it will be of no effect ; unless to prove contracts, entered into in such a manner that the witness may testify as to what he heard, as if he should say : “ I saw and heard such a one make such a contract or agreement.” But if he were only to declare “ that he heard another say, that such and such persons had entered into such an agreement in such manner, or that one man had killed another ;” his testimony would not be legal, because the witness spoke from hearsay only. But if he were to say “ I heard such a one make such a contract with such a one ; or that he saw one man kill another ;” the testimony would be good, and such as the law permits to be heard. We also say that the witnesses ought to be interrogated as to the time, the year, month, day and place, when and where the fact took place of which they speak. For if they disagree among themselves, the one saying it took place in one place, and the other in another ; their testimony will be without effect. It was by that means the prophet Daniel destroyed the testimony of the witnesses produced against Susanna ; they having disagreed as to the place in which the fact occurred. They ought also to be asked what other persons were present when the occurrence took place ; and no other

questions should be put to witnesses of unsuspected character. But if they were base, suspected persons, equivocating in their testimony, the judge may put to them other questions to contradict them by their own words: as by asking them what kind of weather it was, when the fact took place? was it cloudy or did the sun shine? how long had they known the persons of whom they speak? what clothes they wore at the time? For by the answers they make, and the expression of their countenances, the judge may infer whether he should believe them or not, (1)

LAW 29.

In what cases hearsay testimony may be received.

Men sometimes complain of the damage done to their estates or houses, by water conducted thither by means of ancient artificial works, which they pray the judge may be taken away or destroyed. And as it often happens, that the works are so old, that no one living has seen them erected; the ancient sages of the law have thought proper in such cases to admit hearsay testimony, on the witness deposing as follows: "I declare that the water which runs from such a place to such a place, and which causes the damage, is conducted upon works erected by the hands of man." And if he be asked how he knows it, and he answer, that he had heard it from others who saw the works erected, or who had seen those who saw them erected, and that such was the common report: such proof will be sufficient for the plaintiff. We also say, that if the

(1) R. See the laws of the tit. 6. b. 4.

defendant's witnesses declare that they had not seen the works erected, nor had ever heard it said they were erected by the hands of man, and that there was no one living who had heard it so said ; but that it was the common report, that they were natural and not artificial works, such testimony will suffice for the defendant. But in other causes, hearsay testimony cannot be heard, unless in the manner before explained. We moreover say, that the testimony of a witness, who does not explain how he knows what he declares, but only says he believes it, shall be of no effect. (1)

LAW 30.

That the witnesses ought to be heard again, if they had not been examined upon the written questions exhibited to them by the parties.

(Not in force.)

LAW 31.

When the testimony of witnesses taken in writing or returned on a commission, may be rejected.

We say that the testimony given or sent in writing, may be rejected by the party against whom it is produced : for it is contrary to law that a person should send his testimony in writing to the judge : But he should appear in person to speak the truth of what he knows before the judge who has cognizance of the cause, or some other judge to whom the former had given authority to take his testimony ; and whoever takes it, must cause it to be reduced to writing in the manner above stated. We moreover say, that the witnesses must speak of no other facts than those which are

(1) *R. see the laws of the title 6. b. 4.*

pertinent to the cause in which they are sworn to declare the truth : and if they speak of other things foreign thereto, so far they shall not be believed. (1)

LAW 32.

How many witnesses are necessary to make proof in any suit.

Two witnesses of good character, who cannot be rejected for any of the reasons mentioned in the laws of this code, are sufficient evidence in any cause, except it be to prove the acquittance of a debt established by notorial act : The payment or acquittance of which cannot be shewn but by valid written documents ; or by five witnesses, who shall attest they were present when the payment was made or the acquittance given, and that they were requested to be present as witnesses. (2)

(No other part of this law in force.)

LAW 33.

What time shall be allowed to those who have witnesses to produce.

We will shew in this law, the different periods of time which ought to be allowed the parties to produce their witnesses. They are as follows : If the witnesses were in the city where the cause is tried, a term of three days should be allowed ; and if not then produced, a second term of three days ought to be allowed ; and if they could not be produced within these two terms, then a third should be allowed. But if

(1) *R. l. 8, tit. 6, b. 4.*

(2) *R. l. 7, tit. 6, & l. 2, tit. 21, b. 4. C. art. 243, 244 & 245. p. 310 & 312.*

they are not within the city, but in its environs or limits, a term of nine days ought to be allowed the party who has to produce them ; and if necessary, a second term of the same number of days, and even a third, so that they be respectively from nine days to nine days ; and if the witnesses were beyond the jurisdiction of the court, then a period of thirty days should be allowed the party to produce them, on his immediately mentioning their names to the court, and on his moreover swearing that he does not wish to prolong the cause by obtaining time, and that the witnesses were acquainted with the fact which he wished to prove and would swear to it. And if they are not produced within the first delay, two others of thirty days each should in like manner be allowed him if necessary for that purpose. These periods of thirty days relate only to witnesses who reside in the city where the suit is pending, but who are necessarily gone beyond the jurisdiction of the court, to collect their effects. But if they were gone to a foreign country, so that they could not be produced within the above mentioned terms, it shall be at the discretion of the judge who has cognizance of the cause, to grant such time to the party to produce his witnesses, as he shall think necessary, so that the time granted shall in no case exceed nine months. (1)

LAW 34.

Why the judge ought to hear further testimony, if a party wish it, notwithstanding he had said he had no more witnesses to produce.

When one of the parties believing he had produced

(1) R. II. 1 & 3. tit. 6. b. 4.

sufficient proof to establish his claim, declares to the judge that he has finished his testimony, and prays him to render judgment upon what he had heard ; and afterwards repents, and wishes to produce other witnesses : in that case we say, if the depositions of the witnesses already examined, were not opened, and he will swear that he is ignorant of what has been sworn to by the witnesses of both parties ; and if all the terms for producing his evidence had not expired ; any new proof he might wish to produce, ought to be heard, and he shall not be prejudiced by what he had declared to the judge. And this because judges ought to be disposed to use every means in their power to discover the truth. But if the terms of delay had expired, the party cannot produce any further testimony, unless it consisted of some instrument of writing or notarial act : for such evidence may be introduced at any time before the termination of the cause. (a) (1)

LAW 35.

That the judge ought to compel unwilling witnesses to appear and give their testimony.

As the testimony of witnesses is for the common advantage of the parties to a cause, it is therefore the duty of every man who is called upon to give evidence for another before the judge, to appear accordingly, and testify to what he knows. He thereby shews his obedience to the law, and does an act of piety in speak-

(A) The whole of this law is translated, that the latter part of it may be better understood.

(1) *R. l. 7. tit. 6 & l. 4. tit. 9. b. 4.*

ing the truth. But if he contemptuously refuse to appear and give his testimony, the judge may compel his attendance, by seizing upon his goods until he shall comply. But if a witness were upwards of seventy years of age, or were a military man, stationed on the frontiers of the realm, or otherwise employed in the service of the king, so that he could not depart without his command; or were a judge of some other place or an officer engaged in furnishing provisions to the army, or in conducting their pack-horses, or were gone on a pilgrimage. Neither of these persons, during the existence of such impediment, can be compelled to appear and testify in court, against their will. And so we say of persons disabled by sickness; or who have so many enemies that they cannot go to the place where they are summoned to testify, without danger of personal harm.

(No other part of this law in force.)

LAW 36.

In what manner brokers ought to give testimony concerning the things they sell.

When a dispute arises concerning any thing sold by a broker, and the parties mutually agree to make him a witness; the judge ought to compel him to appear and declare what he knows concerning the same. But if one only of the parties wish to make him a witness and the other not; the judge cannot compel him to appear and give his testimony, if he is not willing to come and give it of his own accord. (2)

(1) *R. l. c. tit. 6. b. 4.*

(2) *K. l. 10. tit. 18. b. 5—ib. l. 28. tit. 19. b. 9.*

LAW 37

That the judge may fix a time for the parties to appear and hear the testimony of the witnesses.

We also say that the party who first introduced his witnesses, may, if he choose, introduce others to contradict and overthrow what had been said by the witnesses of his adversary ; but afterwards, neither of the parties can produce any other witnesses.

(No other part of this law in force.)

LAW 38.

What effect the judges ought to give to the depositions of witnesses, which had been taken before arbitrators.

Men sometimes submit their disputes to arbitrators, before whom they produce witnesses to prove their respective claims ; and afterwards refusing to leave the decision of the matter to such arbitrators, return with their cause before the ordinary courts. And as disputes may arise whether the witnesses can be heard or their depositions read anew in court, we shall here explain ourselves in this respect. And we say, that if the parties, at the time of the submission, had made any agreement relative to the witnesses they intended to produce, stipulating whether their testimony should be valid or not, in the event their cause was not decided by the arbitrators ; such agreement will be binding. But if none had been made, then it shall be at the option of the party against whom the witnesses were produced, either to require that they be examined anew, or to retain the testimony they had given before the arbitrators. But if the witnesses were then dead, the testimony they had given before the arbitrators

shall be valid in every respect ; and the judge may proceed to determine the cause thereupon, in the same manner as if it had been taken before himself ; unless the party against whom it is produced, can shew some legal cause why the witnesses or their depositions should be rejected. And we also say, that if the witnesses had been examined before any judge who afterwards died, or had been dismissed from office before the cause was decided ; the judge who succeeds to his place, may render judgment upon the testimony of such witnesses, in the same manner his predecessor could have done were he living. (1)

LAW 39.

In what cases other witnesses may be produced before the court of appeals, though the depositions of the first had already been published.

(Not in force.)

LAW 40.

What is the effect of the testimony of witnesses in a cause.

Such is the force of the testimony of witnesses, that if they are persons who cannot be objected to for any of the causes mentioned in this title, and they fully prove the claim of the party by whom they were produced ; the judge ought conformably thereto, to give judgment in favor of such party. But if both parties produce witnesses by whom they prove their respective claims, in such manner that their evidence is contradictory ; then the judge should examine well the matter, and give credit to those of the witnesses whom he believes to have spoken the truth, or who had given

(1) *R. l. 10. tit. 6. b. 4.*

the most probable account, and who enjoy the best reputation : and this he ought of right to do, notwithstanding what they said were contradicted by the greater number of witnesses. But if the witnesses all enjoyed good characters alike, and equally spoke what was probably true ; the judge should then believe those who agreed in their testimony and were of the greatest number, and decide accordingly in favor of the party who produced them. And if the evidence were such, that there appeared as many witnesses on one side as on the other of equal character, and testifying to what was equally probable ; then we say, the judge shall wholly absolve and acquit the defendant, who shall not be prejudiced by the witnesses who deposed against him : because judges ought ever to be disposed rather to acquit than to condemn the defendant when they discover just reasons for so doing. (1)

LAW 41.

When witnesses differ among themselves, the judge ought to give credit to those whose testimony is most consistent with the fact.

It may happen that the witnesses produced by one of the parties, disagree among themselves and contradict one another. In that case we say, that the judge ought to give credit to those whose testimony seemed most consistent with the truth, though the other witnesses were more numerous : and the party shall not be prejudiced by the contradictory evidence of the latter. For although when a party produces in support

(1) R. See the laws of the title 6. b. 4.

of his claim, two written documents, contradictory to one another, neither of them shall have any effect, as we shall hereafter shew; yet it is not so where the testimony of witnesses is contradictory; because he who produces written documents in evidence, might, previously to exhibiting them, have informed himself whether they were of a contradictory nature or not: it is therefore his own fault if he introduce any document hurtful to his cause. But no one can exercise such precaution with respect to witnesses: because they often say one thing to the party who produces them, and afterwards testify in secret before the judge, contrary to what they know to be true. Any contradiction therefore in their testimony ought not to prejudice the party producing them, as it is not his fault; provided he can establish his claim by some of them who are good men, not contradicted by a greater number equally worthy of belief. But when a witness contradicts himself, his testimony shall be of no effect.

LAW 42.

What punishment witnesses deserve who knowingly bear false testimony.

(Not in force.)

 TITLE XVII.

Of the commissioners of inquest who have a right in virtue of their office, to hear witnesses, although not produced by the parties.

(Not in force.)

Inquisitio prodest ad maleficia detegenda, &c.

[Greg. Lopez.]

TITLES,

Of the Roman Laws, and of the civil code which relate to the title of LAS SIETE PARTIDAS, on instruments of writing, &c.

- Digest, lib. 22. tit. 4. - - *De Fide instrumentorum, &c.*
 Code, lib. 4. tit. 21. - - *De Fide instrumentorum, &c.*
 Novel, 73. ch. 3. - - - - *Si litterarum fides a voce testium discrepet.*
 Novel, 119. ch. 3. - - - - *Ut non aliter credatur instrumen-
 to de altero instrumento facienti
 mentionem, quam si idipsum
 proferatur.*
 Civil Code, book 3. tit. 3. ch. 6. § 1, 2, 3, 4. p. 304 to 310,
 inclusively.

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TITLE XVIII.

*Of instruments of writing which serve as proof in
law suits.*

LAW 1.

*What is meant by authentic acts ; the advantages they afford,
and into how many kinds they are divided.*

Every writing, executed by the hand of a notary public of the council, or sealed with the king's seal, or with that of any other person, having authority to fix his seal, is an authentic act, (*Escriptura*) which is of itself full proof. From the faith given to these writings, the greatest good arises ; for they are the evidence of what has taken place, and full proof of the contract they contain. There are several kinds of them. They are either privileges (*privilejo*) granted by the pope, the emperor, or king, and sealed with his golden or leaden seal, or with his ancient signet which he is accustomed to use on such occasions ; or writings executed by lords and other persons of high dignity, and sealed with a waxen seal. There is also another kind of writing which every man may cause to be sealed with his seal ; and they will have no effect against him, except so far as they had been made and sealed by his orders. There is likewise a sort of writing which every man may execute with his own hand, without seal, and which is a species of proof as we shall hereafter shew. And there is finally another writing called a public instrument, which is made by the hand of a notary public of the council. (1)

(1) *R. l.* 13. *tit.* 25. *b.* 4—*C. art.* 217. *p.* 304.

LAW 2.

What is a charter of privilege, and of its form.

(Not in force.) (a)

LAW 30.

That royal mandates obtained contrary to law are not valid.

If the king grant any letters (*algunas cartas*) contrary to the common rights of any town, or prejudicial to it; the first that is granted ought not to be executed: For it has no force as it is prejudicial to many persons, who ought to shew it to the king, and petition him to excuse them from complying therewith. But if the king afterwards choose that what he had ordered, should be fully executed, then it must be accordingly done. And if the letter be derogatory to the rights of any one in particular; as if it take from him that which was his own without reason or right: or do to him any other known wrong, either in person or property: such letter has no force, nor ought it to be executed, until they to whom it was directed, send to the king to know the reason why he required the execution of the same. For every man ought to presume, that as soon as the king is informed of the fact, he will not order the execution of the letter. (1)

LAW 31.

That a letter (carta) contrary to natural right, is not valid.

Neither the emperor, king, or other great lord ought

(a) The succeeding laws, to the 29th inclusively, relate to the forms of royal charters; no part of them being in force, they have not been translated. For their several heads, see the index to this title.

(1) *R. ll. 1 & 4, tit. 14. b. 4.—Auto 70. tit. 4. b. 2.*

to grant any privilege, (*preuillejo*) or letter (*cartas*) contrary to natural right; and if they do, it will not be valid. And it would be contrary to natural right where it conferred as a privilege, the estate of one man upon another, when the former had not done any thing for which he ought to lose his property: unless the king stood in need of it, that he might erect there, or make of it some work, or other thing necessary for the common good of the kingdom: as if he wanted to build a castle there, or tower, or bridge, or other similar thing which might contribute to the benefit or defence of every one, or of a particular place. But this ought to be done in one of two ways: by previously giving to the owner of the estate another in exchange, or by purchasing it of him at its value. (A) (1)

LAW 54.

How the minutes and acts of a notary public are to be executed.

Every act executed by the hand of a notary public, should contain the names of the contracting parties, the contract as it is stipulated between them, the names of the witnesses who were present, the day, month, year and place when and where it was executed. After all this is written, a small space must be left beneath where the notary ought to put his mark (*signo*) and subscribe his name in this manner: "I such a one, 'notary public of such a place, was present when they

(A) The translation of the subsequent laws from the 32nd to the 53d inclusively is omitted, as they relate only to the nature of franchise, letters of pardon, their forms, &c.—For their heads, see the index to this title.

(1) *R. l. 4. tit. 14. b. 2—C. art. 2. p. 102,*

‘ whose names are written in this act, made the agree-
 ‘ ment, or contract, or sale, or exchange, or will, or
 ‘ other stipulation, as is above set forth ; and that it was
 ‘ at their request or command I executed this public in-
 ‘ strument, and affixed thereto my mark, and subscribed
 ‘ my name.” And it will suffice that all public acts be
 witnessed by two notaries public, who shall subscribe
 their names thereto, independent of the notary by whom
 it was written. And if so many notaries cannot be
 had in the place, then it will be sufficient for three
 good men (*a*) to subscribe as witnesses ; writing their
 names at the end of the instrument before the notary
 subscribes his. But, last wills and testaments must be
 attested by a greater number of witnesses as we shall
 hereafter shew in the title which treats of wills. And
 the notary ought to be vigilant, and endeavor to make
 himself acquainted with the parties for whom he exe-
 cutes the act ; who they are, and of what place, so that
 no fraud may be practised. And when they enter in-
 to a contract or agreement before him, they who are to
 serve as witnesses must be present at the same time,
 and he must show them the contracting parties, inform
 them who they are, explain the nature of their contract,
 and read the minutes which he had prepared, to all of
 them. He shall then ask the parties if they agree to the
 contract as expressed in the minutes which he had read
 to them : and if they answer in the affirmative, he should
 call to witness those who are present, and then draw up
 the public act on parchment according to his minutes

(a) Or at least two witnesses. See law 114 hereafter.

in the manner above said, and deliver it to the person to whom it belongs, and make a note of it upon his minutes in order that he may know that a public act had been taken from them. (1)

LAW 55.

What ought to be done when the notary public falls sick or dies, after he had made the minutes of an act.

Notaries are sometimes prevented by sickness or other impediments from drawing up themselves, public acts on parchment, when so required, from the minutes they had taken, as we have said in the preceeding law. Wherefore we say that the notary ought in such case, to call on another notary public, and shew him in his register the minutes he had made, and request him to draw up the public act conformably to the same: and he ought to comply with such request, and write out the act on parchment with his hand, according to such minutes; and at the end of the act, he ought to make his mark and subscribe his name, and write thus; “I such a one, notary public of such a place, have
‘written this act by order of such a notary, according
‘to the minutes found in his register, which he had
‘made at the request of those whose names are written
‘in this act, and without changing or altering them in
‘any manner; whereupon I have affixed my mark
‘and subscribed my name.” And a public act made in this manner will be as valid as if written by the notary who had made the minutes. But when a notary public dies, the alcades (a) of the place ought to take

(a) Judges.

(1) *R. l. 8. tit. 6, & ll. 1 & 13. tit 2. b. 4—ib. ll. 1 & 2. tit. 4. b. 5.*

with them good men of the council, and go to the notary's house, and collect together all the minutes and registers which they find there, and seal them with their seals, and put them in a place where they can be carefully preserved from loss, alteration or forgery. After which they must be delivered to the notary appointed by the king to succeed the deceased, with power to take possession of his registers. And this must be done in presence of the respectable men who had assisted in fixing the seals on them, if they were yet living and in the place, and if they were not, then before other good men of the council. But the notary appointed to succeed the deceased, must take an oath, well and faithfully to keep and preserve such registers, and when occasion requires, to draw up the public acts for which the minutes had been made, and deliver them to the party to whom they belonged, without diminishing, augmenting or changing any thing, and that he will not commit, or consent that there should be committed, any fraud or forgery whatever. And after the registers have been thus delivered to him by order of the king, and he has been sworn as above, he may execute public acts from the minutes taken by his predecessor, and on subscribing his name thereto, he must say, "I, such a one, notary public of
' such a place, commissioned by the king, have made
' this public act according to the minutes I found
' in the register of such a notary, deceased, and I
' have nothing added, diminished or changed in any
' manner whatever; wherefore I have hereunto affixed
' my seal and subscribed my name." And we also say, that if the witnesses to the minutes are still living, they

ought also to subscribe the public act in the manner above mentioned. And if they are dead, the notary must himself write their names on the public act in the same manner they are written on the minutes. And an act thus made will be valid, and as full proof, as if the notary had drawn it up before he, who had made the minutes, were dead. (1)

LAW 56.

How an act of sale is made. (A)

LAW 111.

For what causes the validity of privileges (preuilejos) and notarial acts may be contested.

We have fully shewn in the foregoing laws, the forms and manner in which privileges, letters issuing from the king's court, and other acts of notaries public should be executed. We now propose to shew the causes for which they may be invalidated. The first is, where the act is such that it cannot be read nor its true meaning understood. The second, where it is effaced, or where a letter is changed or omitted in the name of one of the contracting parties, or in the term of time stipulated between them ; or in the sum of money, or the thing which was the object of the contract; or in the day, month or year, or in the names of the witnesses, or of the notary public, or the name of the place where the act was

(1) *R. ll. 16, 24, 29 & 38. tit. 25. b 4.*

(A) This and the subsequent laws, as far as 110 inclusively, contain various forms of sales, contracts, &c. which cannot be considered as laws, and are not therefore translated. For their several heads, see the index to this title.

made. But if the erasure or letter was made, or changed, or omitted by mistake of the notary public, or were in another part of the act so as not to change its substance ; or if the judge, or other skilful person, do not suspect it was done with bad intention, in that case, we say the act shall not be invalidated. We likewise say, that if it be interlined or effaced in the parts above mentioned ; or torn or cut, so that the letters do not appear, it is then suspicious, and ought not to be believed, unless the party producing it, can prove that it happened without his consent, by violence, or by accident. Also, when the hand writing of the act does not resemble others subscribed by the same notary who therein declares he had made them, no faith should be given to it ; unless good men versed in writing, being first sworn to speak the truth, shall declare, that the dissimilitude arises from the ink, or parchment, or time at which it was written, and that the writing is essentially the same, as we shall hereafter explain. So it will be suspicious, where the subscribing witnesses declare that they had written their names with their own hand, when nevertheless there is such resemblance between their signatures that they all appear to have been written by the same hand : for the hand writing of one notary cannot so resemble that of another, that there shall appear no dissimilitude between them : and for that reason the act shall not be valid, nor will it be valid, if it does not contain mention of the month, day and year in which it was made, and the names of at least two subscribing witnesses, written with their own hands, or by the hand of the notary public who executed the act, according to the cus-

toms of the country. Also where a party produces in court, two notarial acts which contradict one another, upon the same fact, neither of them shall be valid, because it was in his power to have exhibited that only which served his purpose, and no other. (1)

LAW 112.

That judges ought to be vigilant in detecting the frauds which wicked men practise in notarial acts.

So numerous are the frauds which wicked and deceitful men endeavour to commit in notarial acts, that unless the judge is very vigilant in sifting and detecting them, great injury may hence arise. To guard therefore against such an evil, we say that whenever any one produces a notarial writing in court, to prove his demand or support his defence, he shall exhibit it to the judge, and give the adverse party a copy of it, if required. But the copy should contain no mention of the day, year, or place when and where the act was made, unless the adverse party alleges it to be a forgery, and that he is willing to prove it. For if such were his motive in requiring a copy of the act, the whole of it must be given to him complete, he first swearing that he believes it to be a forgery, and that he does not say so maliciously. There is also another reason why a complete copy should be furnished him, though he should not allege he were ready to prove it a forgery : which is, where any one appears in court as the attorney of another, or as the guardian of a minor, and they be required to furnish copies of the act of procuration or letters of guardianship of those for

(1) *R. l. 3, tit. 5. & l. 13. tit. 25. b. 4.*

whom they acted : then the originals must be fully set forth in the copies, with the date and every thing else they contain, in order that the validity of the proceedings in the cause, may not afterwards be questioned, in case the attorney or curator should deny they ever had any power to act. And so we say it would be where a party made use in court of any sentence, order or other decree judicially rendered in a cause ; complete copies of these documents ought to be furnished to the party who requires them, as they are common to both, and as fraud cannot be so easily committed in them as in writings of a different nature. (1)

LAW 113.

In what cases a party is not bound to furnish an entire copy of a privilege, will, or other notarial act.

A party sometimes produces in court, a privilege, or other public act or testament, containing various clauses or stipulations, relating to different subjects ; and wishing to avail himself thereof, exhibits only those parts of them that appertain to his cause, and withholds the rest. We therefore say, that if he be required to furnish a copy of the whole of the privilege act, or will, he will not be obliged to do it, but of that part only which relates to him or of which he wishes to avail himself in court, and no other ; unless the other party contend that the will or act were entirely a forgery.

(2) *R. l. 57. tit. 5. b. 2—ib. l. 3. tit. 5. & ll. 13 & 17. tit. 25. b. 4.*

LAW 114.

In what manner instruments of writing will be valid that are free from any of the vices and defects spoken of above.

Acts which cannot be rejected on account of any of the vices or defects spoken of in the laws of this title, make proof of the agreements they contain : but that it may be known with more certainty what they are, we will here explain ourselves in this respect. We therefore say, that if an act be sealed with the king's seal, or with that of an archbishop, or bishop, or city council, or abbot, or master of an order of knighthood, it will make proof of what it contains against him at whose instance it was sealed. So we say, an act, sealed with the seal of a count, of a council, or of any person having an authentic seal, will have the same effect. And we likewise say, that every act made by the hand of a notary public, in which is written the names of at least two witnesses, the day, month, year and place when and where it was made, as we have above shewn, makes proof of what it contains. And so we say, that any writing not executed by the hand of a notary public, but by some other person, and signed by two witnesses in their own hand writing, will be valid during the lives of the witnesses, on their attesting that the contract was made as is set forth in such writing ; provided it were a contract which could be proved by the testimony of two witnesses. And we likewise say, if any one execute any writing, operating against himself with his own hand, or cause it to be executed by another, or put his seal thereto, it will be proof in any suit against him ; as for any thing lent him, as for bread

money, or any other moveable thing which can be counted, weighed or measured. But if he whose name is written in the instrument denies it, no faith shall be given to it, unless the other party prove that it was made by him or by his order. Yet if the writing concerned any specific thing; as the sale or exchange of a house, vineyard, or other object, it would not be full proof thereof, though it would afford a presumption: Because writings of this nature, ought to be executed by the hand of a notary public, or other notary, and signed by respectable witnesses, in order to prevent all fraud or forgery. We also say, that all privileges or royal mandates, executed in the ordinary way practised by the king during his life, and which make mention of him, shall be believed, though they should not be sealed; as we find there have been kings who were accustomed not to seal, but to affix their mark to their acts. And although they were very old, and some of the letters were destroyed or effaced by insects, or worms, or other thing, or were stained by water falling on them; nevertheless if they can be read, and their meaning understood, they will have effect as we have shewn above. But if the party against whom such documents are produced in court, wishes to prove that they are forged, or to invalidate them for any other cause; he ought to be heard. And what we here say of the faith that is to be given in court to privileges and other acts, is understood where the party who wishes to avail himself of them, produces the originals, and not copies of them. For if he produce the copy only in support of his cause, no faith should be given to it,

except he exhibit the original from which it was taken ; unless the copy were authenticated and sealed with the king's seal, or that of some other lord, to which faith might be given without suspicion. (1)

LAW 115.

What are the public acts to which faith should, or should not be given.

A party frequently produces in court, public acts in support of his pretensions ; whereupon his adversary alleges that they ought not to be believed, because the person by whom they were made, and whose name is written therein, was not a notary public. In such case we say, that the judge ought to order the party producing the act, if he wishes to avail himself of it, to prove that it was made by a notary public, or that in the place where it was made, the person who executed it was generally reputed to be a notary, and that he exercised the functions of one. Upon the proof of either of these facts, the act ought to be believed, otherwise no faith shall be given to it. And if the notary public whose name is mentioned in the act, appear before the judge and declare that it was not written by him, he shall be believed, and the act rejected as a forgery ; unless the party producing it, can prove to the contrary. But if he acknowledge that it was really written by him ; and on the other side, the subscribing witnesses declare that they were not present when the contract as set forth in the act, was entered into between the parties ; then we say, that if the notary were a man of good character, and the original minutes found in his

(2) *R. l. 13. tit. 25. b. 4. C. art. 224. p. 306. & art. 241. p. 310.*

register are conformable to the act, it ought to have effect, and the notary should be believed in preference to the witnesses : and this because it often happens that witnesses attest a contract, and afterwards forget it ; and the act being moreover corroborated by the minutes and good character of the notary, it ought to be believed. For men reduce their contracts and agreements to writing in order to perpetuate the remembrance of the manner in which they were made, lest they should be forgotten by themselves and the witnesses who were present when they were entered into. But if on the contrary the notary were of bad character, and the witnesses were credible men, and the contract or agreement mentioned in the act, had been recently made ; and if moreover all the witnesses agreed in declaring the same thing, they ought to be believed in preference to the notary. (1)

LAW 116.

The judge ought to take the oath of a party who alleges that an act is a forgery, that he does not allege it maliciously ; and then give him time to prove what he alleges.

It may be that a party produces in court, in support of his claim or defense, an act which his adversary says ought not to be believed, because it is a forgery, and that he wished to prove it. In that case, the judge ought to take his oath that he does not say so maliciously, and give him time to prove what he alleges. But if the party producing it declare, that it is unnecessary to grant any time, as he does not intend to make any further use of the act ; then the judge

(1) *R. l. 3. tit. 5 & l. 13. tit. 25. b. 4.*

shall not grant any time accordingly. But if he attempt afterwards to make any use of it in court, it shall not be believed or received, though he should offer to prove it were not a forgery. We also say, that if any one wished to prove that an act produced against him were a forgery, he may do it any time before final judgment rendered in the cause in which it was used; and even afterwards before the judge of appeals. But if upon the act which he declares to be a forgery, judgment be rendered against him, and he make no appeal therefrom; or if he lose his cause on the appeal; he cannot afterwards shew that sentence had been given against him on a forged writing; as he had already contended it was a forgery, but could not prove it, and judgment had been rendered against him, from which he had not appealed; or if he had appealed, he had finally lost the cause, as is above said. But if a cause had been lost by means of a forged act, and the party against whom it was produced had not contended during the whole progress of the suit, that it was a forgery, and that he wished to prove it; and after he had been cast and judgment gone against him, he should then allege it were rendered upon a forged act, and that he wished to prove it; he ought to be heard, notwithstanding he had not appealed from the judgment that had been given against him. (1)

LAW 117.

For what reason a public act ought not to be believed, if the party against whom it was produced, proves the contrary of what it contains.

Where a man produces in court, a notarial act, in

(2) *R. l. 3. tit. 5. & l. 1. tit. 6. b. 4.*

order to prove that another owes him something; and the party against whom it is produced alleges that it ought not to have any effect, or make proof against him, as he wishes to shew, that during all the day on which the act purports to have been executed, he was so far distant from the place where it is said to have been made, that it was impossible he should be present: in that case we say, that whoever undertakes to invalidate an act for such a cause, ought to be heard as follows: that is, if the act were made by the hand of a notary public, he may invalidate it by producing some other public act, executed and witnessed in the place where he alleges he really was; or he may prove that he was there by four good and credible men: then no faith shall be given to the act produced against him. But if the writing he wished to disprove were not executed by the hand of a notary public, it will be sufficient for him to shew that he was elsewhere as is said above, by the testimony of two credible, unsuspected witnesses. (1)

LAW 118.

That if any one wish to invalidate a public act, the judge ought to be vigilant in examining the hand writing, whether it were genuine (valedera) or not.

Where either of the parties attempts to invalidate a public act produced in court against him, saying, that it ought not to be believed, because it is not in the hand writing of him who says he made it, and whose name is written in it; and thereupon exhibits another act in the hand writing of the same notary unlike the

(1) *R. l 3. tit. 25. b. 4. C. art. 242. p. 310.*

other in both letter and form : in this and similar cases we say, that if the notary whose name is written in the act, be still living, the judge should cause him to appear before him, and shew him both acts, and ask him if he made them ; and if he answer in the affirmative, they shall both be believed, notwithstanding they are unlike one another in the hand writing or form, as nobody writes always in the same manner : For the changes of the weather, the use of different ink and pen often render the hand writing very unlike ; as does also the sickness or old age of the notary : For when a man is young and in health, he writes very differently from what he does when old and infirm. But if the notary declare that the first act exhibited in court, was not made by him, no faith ought to be given to it. And if he were not living, or were in another country, so distant that he could not be made to appear in order to be interrogated ; then the judge shall take both acts, and associate with him good and skillful men, acquainted with the forms and figures of letters and their variations, and swear them that they will well and faithfully examine and investigate the hand writing of both, and truly declare their opinion thereon, uninfluenced by hatred, fear, affection or any other cause whatever. He ought moreover, to cause both of the parties to be sworn ; and first him who attacks the validity of the act, that he does not do it maliciously, but because he has no other means to destroy its effect ; and secondly, the other party, that he has not done, nor will do any thing to prevent the discovery of the truth relative to the act. Then the judge should, together with the two *experts*, carefully consider and examine the hand writing, the fi-

gure and form of the letters, and the mark (*el signo*) of the notary : and if they all agree that the hand writing is so dissimilar, that there was reason to suspect the authenticity of the act ; it shall then be at the discretion of the judge to reject or admit it as he shall think proper. For the ancient sages thought that such verification of hand writing, was not full proof, for the reasons above mentioned ; they have therefore left it to the discretion of the judge to rely on such proof, when he thought it good and sufficient, or to reject it if he conscientiously believed the contrary. (1)

LAW 119.

What are the other kinds of proof made use of in court by the parties to establish their respective claims.

Men make use in court, of different sorts of proof in support of their pretentions, as we have shewn in the laws of this title. They may not only produce witnesses and public acts ; but also writings drawn up by persons who are not notaries. We therefore say that if either of the parties exhibit in court any writing made by his adversary himself, or by another under his orders, and the contract or agreement therein contained, be for a consideration, expressed thus : “ That ‘ such a one owes such a one, so many maravedis ‘ money lent, or left in deposit,” or which he owed for any other lawful cause : and the document be acknowledged by the person against whom it is produced, it will be of the same force as if made by the hand of a notary public. But if he deny that it was made either by himself or by any other person under his orders ;

(1) *R. l. 13. tit. 25. b. 4. C. art. 226. p. 306.*

and the other reply in the affirmative, and offers to put his adversary on his oath; then the latter shall swear whether he did or did not make the writing himself or cause it to be made by another person, But if the party producing the document, instead of relying on the oath of his adversary, produces another writing, really written by his hand, entirely resembling the first in the hand writing and form of the letters; nevertheless we say, it ought not to be believed, unless he prove by two unsuspected witnesses, that his adversary himself made the instrument on which he relies, or caused it to be made by another person. We also say that if either of the parties produce in support of his claim any writing not written by a notary public, and his adversary, in order to discredit it, exhibit another writing executed by the hand of the same person, but totally unlike it in the hand writing and form of the letters; if then the party producing the first document, prove by the oaths of two unsuspected witnesses, that they saw the person whose name is written in the document draw it up himself, or cause another to do it for him; faith should be given to it, notwithstanding the other party exhibited another writing executed by the hand of the same person, but very unlike it in the hand writing and the form of the letters. (1)

LAW 120.

That a guardian cannot contradict the inventory he has made of the estate of his ward-

Where a guardian receives into his possession the estate of an orphan, and causes a public act (called an

(1) *R. l. 14. tit. 8. b. 2. C. art. 224 & 226. p. 306.*

inventory) of what he had so received; he cannot afterwards, when he comes to render an account to the orphan, contradict such act, and be permitted to prove that it made mention of more than he had received, and that he had knowingly consented thereto, in order that the orphan might appear richer than he really was, to enable him to marry more advantageously, or for other like reason. For it is not to be presumed, that he would have executed any writing obligating himself for more than he had received.

LAW 121.

That which is written in the journals kept as memoranda, shall not prejudice those against whom it is written.

In order to supply the defect of memory, men write in their journals what is due to them, and likewise what they owe: and they sometimes state the truth, and sometimes the contrary, through forgetfulness or evil intention. We therefore say, that if it be found written in the journals of any person deceased, that another was to give him, or do something for him; it ought not to be believed or make proof, notwithstanding he who had caused it to be written were a good man, and had sworn to the truth of it. For it would be unreasonable and unjust to give any man the power to make others his debtor by his own writings, whenever he pleased. We likewise say, that if any one, on the approach of death, should declare and cause to be written, that such a one was his debtor, that he owed him such a sum, as, for example, ten maravedis, when in truth he owed twenty, and the heirs prove this fact;

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then they shall not be prejudiced by what the deceased had said or caused to be written, but may, if they choose, sue for, and recover the twenty maravedis. And this, because it ought to be presumed by every one, that what the deceased said or caused to be written, was through error, since the heirs prove that twenty maravedis were really due. But if before his death, the deceased had said, or any writing made by him or another under his orders, had been found, in which he declared, that if such a one owed him more than ten maravedis, he released him from the overplus; or if he had sworn that he owed him no more than that sum; then the heirs cannot claim more than the deceased said was due, notwithstanding they wished to prove that the debt was more considerable. (A) (1)

TITLES,

Of the Roman and Spanish Laws, which relate to the title
of LAS SIETE PARTIDAS, on Notaries public.

Code, lib. 12. tit. 50. - - *De numerariis, Actuariis, &c.*

Novel, 44. tit. 23. col. 4. - - - *De Tabellionibus, &c.*

Fuero Real, book 1. tit. 8.

Ordenamiento Real, book 2. tit. 18.

Recopilacion de Castilla, book 4. tit. 25.

Autos Acordados, book 4. tit. 25.

Recopilacion de las Indias, book 5. tit. 8.

(A) In many of the preceding laws there are some provisions which may not be in force; but being inseparably connected with those that were, the whole has been necessarily translated together.

(1) *R. l. 10. tit. 13. b. 5.*

OF NOTARIES PUBLIC.

What is meant by a notary public, - - - - -	LAW 1
Of the qualifications of a notary ; and that he ought to enjoy a good character, - - - - -	2
Who may appoint the notaries of the king's court, and those of towns and cities, - - - - -	3
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to take for the acts they make, - - - - - LAW 15
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TITLE XIX.

*Of notaries public; how many kinds there are; and
 of the advantages arising from the faithful perform-
 ance of the duties of their offices. (1)*

LAW 1.

What is meant by a notary public.

By a notary public is meant a person skilled in writing: there are two kinds of notaries. The first, they who draw up the privileges and other instruments of writing, issuing from the king's court: the second, they who execute acts of sale, purchase, and the contracts or agreements which men enter into, in towns and cities. The good they do is very great, when they faithfully discharge the duties of their offices: for by them the necessary business of the kingdom is executed, and dispatched; and through them the remembrance of things past is perpetuated in the minutes preserved in their registers, and by the acts they execute, as we have shewn in the preceding title which spoke of their writings. (2)

(1) *R. tit. 25, 26 & 27. b. 4.*

(2) *R. l. 1. tit. 25. b. 4.*

LAW 2.

Of the qualifications of a notary ; and that he ought to enjoy a good character.

We likewise say, that the notaries public appointed for towns, cities and other places, ought to be free men, christians, and of good report. They ought moreover to write well, and be learned in the notarial art, that they may clearly understand and express the contracts and agreements entered into by the parties. They should be able to observe secrecy, so as in no wise, to disclose the contents of wills or other acts which they had been required to execute in secret, unless by withholding them, injury might be done the king or kingdom. And we further say, that they must reside in the places where they officiate as notaries, that they may be better acquainted with the persons for whom the acts are made. (1)

(No other part of this law in force.)

LAW 3.

Who may appoint the notaries of the king's court, and those of towns and cities.

The power of appointing notaries belongs to the emperor or king, because they are in a manner, one of the branches of sovereign authority, which resides in the king. For to them is confided the keeping and preservation of the acts executed in the king's court, and the towns and cities of the realm ; and they are moreover, the public witnesses of the contracts and agreements which men enter into with one another. It

(1) *R. ll. 1. 2. 3. 5. & 20 tit. 25. b. 4.*

would not therefore be proper, that a trust of such high importance, should be conferred by any other than the emperor or king, or by those to whom he had specially granted power to that effect. For as was said by the ancient sages from whom we derive our laws, the keeping of those things which concern the whole kingdom in common, belongs properly to the king, who is the head and lord of the realm : nor has any other person than himself the power so effectually to do it. It is moreover proper that he should exercise that right, to avoid thereby the discord that would otherwise arise on the appointment of such officers : for if it were exercised by more than one person, they might seldom agree in their choice ; and they who were appointed would ever feel a bias and partiality for those by whom they were chosen, rather than for the others, whereby the common good of all would not be regarded. Nevertheless, they who have the power of appointing judges in certain places, have likewise the right to appoint the notaries who record what passes before them. But no person has the power to appoint the notaries public of the council, whose acts have full faith throughout the kingdom, unless specially authorised to that effect by the king, for the reasons above mentioned. (A) (1)

LAW 4.

How notaries public ought to be examined.

When notaries are presented before the king, they

(A) This and the next succeeding law are translated with a view to shew the high trust reposed in notaries public, and the great caution exercised by the Spanish government in selecting them.

(1) *R. ll. 1, 2, 3 & 5. tit. 25. b. 4.—Ibid l. 5. tit. 2. b. 7.*

ought to be examined, that it may be certain they are well skilled in writing, and possess the other qualifications mentioned in the preceding law. When therefore any person appears, or is brought before him to be appointed either as notary for his court, or for taking inquests, or for any other place, he should inform himself by means of those about his court, who are skilled in such matters, whether such person be qualified for the office. And the king himself ought moreover to examine him, and not to appoint him, unless he were duly qualified. But if he were only intended as notary in some town or city, the king ought to inform himself by means of good men from the same place with the candidate, and the persons about his court, and from others from whom he can derive the best information, whether he were qualified for the office or not; and if he found him duly qualified, he should appoint him, and not otherwise. And the notaries of the king's court ought to take an oath that they will, without delay, well and faithfully execute their acts; that they will not be influenced by love, hatred, fear, revenge, entreaty, nor by any gift or promise of reward; and above all, that they will in all they do, observe the secrets of the king, and his kingdom; of his queen, of his children, and of all things which appertain to him. And the notaries of towns and cities ought also to take an oath, that they will watch over the preservation of the king and his kingdom, and of all things that appertain to him, as we have above said; and that they will moreover watch over the interests and honor of their respective councils, to the best of their ability; and that they will well

and faithfully execute all their acts, and observe all other things which we before said, are to be observed by the notaries who execute the acts of the king. (1)

LAW 5.

What things ought to be observed by notaries public.

Notaries must observe what is hereafter specified in this law, by which means they will faithfully acquit themselves of the duties of their offices. That is to say, first, if the king orders them to execute any secret act, they must not exhibit it to any person, nor make any sign or demonstration by themselves or through others, by which its contents may be known; unless to those persons designated by the king. Nor ought they to communicate the contents of other acts not of a secret nature, except to those to whom they are obliged to shew them; as to the chancellor, a notary, a judge, or to the person who affixes the seal, (*Sellador.*) They must moreover take care to execute their acts with their own hands, and not employ others to do it for them. But if they happen to be sick, or otherwise hindered, or so occupied with urgent business, that they cannot do it themselves, they may cause it to be done by another, who must subscribe his name in the act, and state that he wrote it at the request of another; and after it is written, he who ordered it to be made, ought to write with his own hand at the end of the act, that he ordered it to be made;

(1) *R. ll. 1, 3, 3, 5 & 23. tit. 25. b 4.*

and if he does otherwise, the act will be false, and he will incur the penalty of forgery. (1)

LAW 6.

That notaries ought to be very careful in drawing up letters of justice.

(Not in force.)

LAW 7

That the notaries of the king's court, and of cities and towns ought to write the words of their acts in full, and not by abbreviations.

The notaries of the king's court, as well as those of towns and cities, ought in all the privileges and acts which they make, to write out in full, all the words, and not abbreviate them in any of the particulars herein mentioned, in order that no error may be committed, or any dispute arise as to their meaning. They must not therefore, on any occasion, express the name of either a man or woman by a single letter, as A. for Alfonso; nor the name of a place, or a sum of money, or any thing else; as H. for a hundred. And so of the date (a) at which the act is executed. And any privilege or other act made otherwise than is provided in this law, shall be void; and the notary by whom it was made, shall pay the party all the loss and damage he had thereby sustained. (1)

(a) Nota hoc, et advertant tabelliones ut annos Domini ponat extense, et non per literas significativas numeri. Greg. Lopes.

(1) R. ll. 13, 16 & 29. tit. 25. b. 4.

(1) R. l. 7. tit. 20. b. 2—ib. ll. 16 & 19. tit. 25. b. 4.

LAW 8.

What advantages arise from general registers, and what ought to be done and observed by those who keep them.

Recorders, (*registradores*) are other notaries employed in the king's court to transcribe acts in books, called registers. And we will here explain why these books are so called, the advantages they afford, and what is to be done and observed by the notaries who keep them. And we say, that by a register is meant a book kept to perpetuate the remembrance of all national acts and charters that are made. And it affords this advantage, that if a privilege or act be lost, or torn, or effaced by time, or by any other means : or if, from an erasure or any other cause, doubts arise upon its construction ; then by means of the register, those that are lost may be supplied, those that are old may be renewed, and all doubts and suspicions, as to their meaning, removed. Moreover, if any act had been delivered differently from what the law prescribes ; the register will shew who delivered it, and in what manner. And it shall be the duty of the keeper of the registers, to transcribe all acts, as they are delivered to him, without adding or diminishing any thing whatever. And he shall shew them to no one, except the notary, or the person appointed to seal notarial acts (*sellador*,) unless by the command of the king ; or of those who decide causes and administer justice, when they have occasion to inspect any of the documents he has under his care. And he shall furthermore divide his registers by months, so that he may more easily know what

was done in each month ; and at the end of the year, what was done during that time. (A) (1)

LAW 9.

What ought to be observed by the notaries of cities and towns.

Notaries public of cities and towns ought to do and observe the following things : first, they must have a book to serve as a register, in which they must write the minutes of every act as prescribed by the judge, or as required by the contracting parties. (b) After which, they must draw up the public act itself, observing the form peculiar to each, according to what is said in the next preceding title, without substantially changing or altering any thing contained in the register ; and then deliver it to the person entitled to it, notwithstanding he had been forbid to do so by the other party, except he were prohibited by the judge, for some good cause shewn by such party. And we moreover command all notaries public to transcribe all their acts in a register, in order that, if any of them be lost, or any doubt should arise concerning their contents, recourse may be had to such register, in the

(A) Though this law is not repealed by any act of the Legislature, yet its wise provisions cannot be enforced, as there is no general registry of public acts in the state. The destruction of the records of a notary public by fire or other accident, might involve thousands in ruin without a remedy.

(b) By a decree of Dona Jabel, in 1503, notaries are required to draw up on their registers, the original act in full, and not by notes or minutes. A copy is then furnished the party to serve him instead of the act itself which was formerly made out from such notes, Febr. Lib. Escrib. ch. 16. § 1. Nos. 3 & 9.

(1) *R. ll. 1, 4 & 6. tit. 15. b. 2—ib. ll. 12, 16 & 24. tit. 25. b. 4.*

manner we have above mentioned, respecting the acts executed by the notaries of the king's court. (1)

LAW 10.

That the notary ought to renew the act when the party to whom he had given it, declares that he had lost it. (A)

The party who had in his possession the act made by the notary public, may happen to loose it, or it may be stolen from him, and he may then apply to the notary who executed it to give him another. And as such applications may be made with evil intentions, we will here instruct the notary how to guard against the commission of any errors in that respect, and we say that if the act which he declares he had lost, were an act of purchase, or sale, or exchange, or a will, or a letter of attorney, or any similar document of such a nature, that being made double (*dobladados*) no injury could arise to the adverse party; the notary, may, of himself, make out another, according to the minutes of his register, in the same manner he had made the first, and deliver it to the party entitled to it. But if it were an act importing a debt or other thing due to another person who might demand payment thereof as often as the act appeared, in that case the notary can not of him-

(A) By the Spanish Laws, the act drawn up by the notary from the minutes on his register, was delivered to the party entitled to it. A second act could not be obtained unless by order of the judge, upon giving notice to the adverse party, and upon shewing that the first was lost or obliterated.

(1) *R. ll.* 12, 13, 16 & 17. *tit.* 5. *b.* 4.

self draw up another and deliver it to the party ; for the latter may demand it with fraudulent motives, after he had been paid, or had acquitted the debt, by which means the debtor might sustain great damage. He must therefore go before the judge, and summon his debtor who had obliged himself by the act ; and if the latter there acknowledge that he really owes the debt for which the act was made, and make no objection to the renewal of it ; then the judge shall take the following oath of the creditor : “ You do swear that the act
“ of which you demand a renewal, is really lost, and
“ that you do not know where it is, nor who has it :
“ That you have not lost it through fraud or any evil
“ intention ; and that if at any time you find it, you
“ will return it to the notary who made it, that it may
“ be erased and cancelled ; and that you never will use
“ it to the prejudice of your adversary,” and after the judge shall have administered the oath in this manner, he shall order the notary to draw up another act according to the minutes of his register, and deliver it to him ; and the notary shall do it accordingly, and in the place where he subscribes his name he must say
“ I such a one, notary public, was present when all
“ that is said in this act, took place, and at the request
“ of the parties I wrote it, and thereto affixed my seal.
“ And this act I hereby make a second time by the order of the judge, upon the debtor therein mentioned
“ being cited before him, and making no objections to
“ its renewal : and also because the party requiring its
“ renewal, has sworn that he has really lost the first,
“ without any fraudulent motives on his part.” And then the notary ought to deliver the act so made to the

party who had petitioned for it, or to whom it belonged. And that the debtor obligated by the act, may not say that it was without his knowledge or consent that it was renewed; the judge must be careful to cause the facts relative thereto, to be written in full on his records, as they actually took place. (A) (1)

LAW 11.

In what manner a notary ought to renew an act, when the person obligated thereby is cited and does not appear, or appears and objects to its renewal.

When the creditor cites his debtor before the judge in order to obtain a decree for the renewal of the public act by which the debt was created, and which he alleges is lost, as we observed in the preceding law, and the debtor be obstinate and unwilling to appear either in person or by attorney, to make opposition: in that case the judge ought to take the oath of the creditor, in the manner above prescribed; and cause him further more to swear, that he had not been paid the debt for which he required the renewal of the act; and then order the notary to renew it accordingly, and deliver it to him: whereupon it shall be the duty of the notary to obey the order, and in the place where he subscribes his name, he must observe the formality mentioned in the preceding law; except

(A) Although notaries public are in the habit of delivering copies of all public acts enregistered in their offices, to any person who will pay the fees for making them out; yet it does not appear that this law has ever been repealed, by either the Spanish government or our own Legislature, unless impliedly by articles 234 & 235. Civil Code, page 308.

(1) *R. l. 17. tit. 25. b. 4.*

that he should add, that the debtor was cited, and would not appear, or send any one to make opposition, to the renewal of the act. But if the debtor appear upon being summoned, and deny that he owes the claimant any thing, and objected to the renewal of the act; then the judge ought to give him a certain time, at which he might prove the payment of the debt; and if he could not prove it, then the judge ought to take the oath of the party requiring the renewal of the act, in the manner above prescribed, and order the notary to make another and deliver it to him; and the notary ought to do so, as we have said above. But if the debtor prove the payment of the debt, then the act shall not be renewed. Or if he oppose its renewal, alleging that the first act which is said to be lost, was then in his possession, and was delivered to him by his adversary, with the intention to acquit the debt: if he prove this fact, it ought not to be renewed; and he ought on the contrary to be discharged from the debt. This provision of the law applies, where the act in dispute, is neither torn nor effaced; but if it be torn or effaced; or were in the possession of the debtor, who on that account objects to its renewal; and the adverse party thereupon reply that he had lost it, or that it had been stolen from him, and that it came into the power of his debtor, without his consent; and he prove accordingly that he had lost it, by one of these means; the judge ought to order the notary to make it anew, and deliver it to him. But if he cannot make out such proof, and the torn or effaced act be found, as is above said, in the possession of the debtor; then it ought not to be received; because the ancient sages of the law, thought

that in such case, the debtor should stand acquitted of the debt. (1)

LAW 12.

What a notary public ought to do when any one applies to him for the renewal of an act that is old.

Acts made by notaries public are sometimes effaced by accident, or by being badly kept, so that they cannot be read as at first: wherefore we say that when any one requires the notary to renew an act in such a situation, when it is not effaced in a suspicious place, nor destroyed in such manner that it cannot be read, nor obliterated or torn so that the letters were gone: if it were an act importing a debt, the debtor must be cited before the judge, that he may, if he choose, oppose the request of his adversary. And if he make no opposition to its renewal; or if he allege that he had paid the debt, or that he had been discharged from it, and could not prove it: then the judge ought to order the notary to renew it, according to the original minutes of his register, from which the first had been made. But if it be a deed of gift, of sale or exchange, or other act of such a nature, that no injury could arise to the adverse party from increasing their number: and the writings were not torn, obliterated or effaced in a suspicious place; as in the names of the contracting parties, of the witnesses or notary; or in the price of the thing, or in the name of the thing itself, or in the day, month, year or place when and where the act was made: then the notary may renew it, without the au-

(1) *R.l. 17 tit. 25. b. 4.*

thority of the judge, according to the register from which the first had been taken. And we moreover say that faith ought to be given to an act in such a situation, though it were not renewed, provided, it can be read and the intention of the parties clearly understood from its contents. But if it were torn or effaced in any of the places above mentioned, it ought to be neither believed nor renewed; unless the party who exhibits, it can prove, that another person had torn or effaced it by accident, or force, without his consent. In that case he ought not to be prejudiced thereby; but on proving the fact, the act ought to have the same effect, as if it had not been torn or effaced; and it ought to be renewed for him, without objection, if he require it, according to the original minutes from which the first had been taken. But the notary who renews it, ought to mention the cause of its renewal, in the place he subscribes his name. (1)

LAW 13.

What fee the notaries of the king's court ought to take for drawing up privileges and acts, which they write on parchment.

(Not in force.)

LAW 14.

How notaries public of towns and cities ought to be honored and respected.

(Not in force.)

LAW 15.

What fees notaries public of towns and cities are to take, for the acts they make.

(Not in force.)

(1) R. l. 17. tit. 25. b. 4.

LAW 16.

What punishment the notaries of the king's court, and of cities incur, when they commit forgery in their official acts.
(Not in force.)

 TITLE XX.

Of seals and the keepers of them in chancery, (canceleria.) (None of the laws of this title are believed to be in force, and are therefore not translated.) (A)

 TITLE XXI.

Of the counsellors (consejeros) or assistants to the judges. (The laws of this title, empower a judge in difficult or doubtful cases, to ask the assistance of persons learned in jurisprudence, in making up his judgment.)
(Not in force.)

(A) The following account of the chancery is given in law 6, same title.

Canceleria, is the place where all acts are brought to be sealed. And they who are charged with receiving them, must examine them with care, and destroy those that are not properly executed, and seal those that are made according to law. For which reason it is called *canceleria*, because there, all notarial acts, not properly drawn up, are cancelled and destroyed.

Canceleria, est locus a quem litera portantur sigillandæ, si sunt justa ; cateræ autem cancellandæ. Greg. Lopez.

TITLES,

Of the Roman and Spanish Laws, which relate to the title
of LAS SIETE PARTIDAS, on Judgments.

Digest lib. 22. tit. 1. - - *De judiciis et ubi quisque agere
vel conveniri debeat.*

Digest lib. 42. tit. 1. - - *De re judicata et de effectu senten-
tiarum et de interlocutoribus.*

Code lib. 3. tit. 1. - - - *De re judicata.*

Code lib. 7. tit. 43. - - - *Quomodo et quando judex senten-
tiam proferre debeat, &c.*

Code lib. 7. tit. 44. - - - *De sententiis ex libello recitandis.*

Code lib. 7. tit. 45. - - - *De sententiis et interlocutoribus
omnium judicum.*

Code lib. 7. tit. 46. - - - *De sententiis quae sine certa quan-
titate profertur.*

Code lib. 7. tit. 47. - - - *De sententiis quae pro eo quod in-
terest proferantur.*

Code lib. 7. tit. 48. - - - *Si a non competenti judice judica-
tum esse dicatur.*

Code lib. 7. tit. 49. - - - *De poena judicis qui male judicavit
vel ejus qui judicem vel ad-
versarium corrumpere cura-
vit.*

Fuero Viejo, book 8. tit. 3.

Fuero Real, book 2. tit. 14.

Leyes del Estilo, ll. 138, 161, 198, 218, 220, 251.

Ordenamiento de Alcala, tit. 12.

Ordenamiento Real, book 3. tit. 13 & 15.

Recopilacion de Castilla, b. 4. tit. 17.

Recopilacion de las Indias, book 2. tit. 15. ll. 97 & 107.

OF JUDGMENTS.

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TITLE XXII.

Of judgments which put an end and termination to law suits.

LAW 1.

What is meant by a judgment. (A)

Judgment, in common speech, means the same as *sententia*, in Latin. But to speak with more precision, a judgment is an order or decree rendered by a judge, against one of the parties to a cause litigated before him. A judgment ought not to be rendered against nature, nor the laws of this code, nor against good morals. It would be against nature, if the judge were to determine any person to be the son of another, when such person were older than he whom he pronounced to be his father. And against justice and law where a free man is condemned to be a slave, or a Christian slave is decreed to be the slave of a Jew. And against good morals, where the judge orders a man to be disloyal to his lord; or to kill any one; or a woman to prostitute her person to a man in order to pay him what she owed him. All such and other

(A) *Sententia est judicis jussus porti ratione litis coram eo ventilatæ factus, que nec sit contra naturam, nec contra jus, nec contra bonos mores. Contra naturam puta, cum majori ætate pronunciatur filius minoris: contra jus, ut cum homo liber pronunciatur, aut quod mancipium christiannm habeat judæus in servum, vel quod impubes potuit facere testamentum validum: contra bonos mores, ut quod non sit domino fidelis, aut hominem interficiat vel adulterium committat. Istæ sententiæ tales non valent, nec sententiæ nomen merentur habere. Hoc dicet. Greg. Lopez.*

like judgments ought not to have any effect, or the name of judgments. (1)

LAW 2.

What advantages arise from a judgment, and how many kinds there are.

Great advantages arise from an upright judgment ; for by it disputes are ended and each party obtains his right. Judgments are divided into three kinds. The first is the order given by the judge to the defendant, to pay the plaintiff the sum, or to deliver to him the thing which he acknowledges in court, to be due him, and for which the suit is instituted. The second is, where the judge renders judgment against the defendant for want of an answer ; or where he gives judgment upon any new point arising in the cause, other than the principal demand. As where a question arises concerning the validity of a power of attorney : or where one of the parties brings forward witnesses, or produces notarial acts or privileges in support of his cause, and his adversary alleges certain reasons against the admissibility of the witnesses, or with a view to contradict the acts or privileges. For upon all these and similar points, the judge should render his judgment before he determines the main cause. And such judgments as these are called in Latin, *interlocutoria*, which means a decision or order, rendered upon some doubt, arising in the progress of the cause. The judge may render such interlocutory judgements either verbally or in writing ; and he

(1) *R. ll. 1. & 2. tit. 17. b. 4.*

may also annul, or rectify them for any good cause whatever; provided it be before rendering final judgment on the principal demand. The third kind of judgment is the sentence called in Latin *definitiva*, which means a final judgment rendered upon the principal demand, by absolving or condemning the defendant. (1)

LAW 3.

What are the requisites of a judgment.

Every judgement, and more especially definitive judgments, must be certain and according to justice, as is required by the laws of this code; and rendered upon the most careful investigation and knowledge of the facts upon which it is founded. For after a definitive judgment is once rendered, whether well or ill, it can not be annulled or altered by the judge who rendered it; unless he were the king or the first president of the king's court. But if in rendering a final judgment, concerning the principal thing in dispute, the judge had omitted to mention its fruits, or rents; or had not condemned the party cast to pay the costs, or if he had by chance, condemned him to pay more or less of these things, than he ought to have done: in such matters as these, every judge can amend and rectify his judgments, as he may deem just; provided he do it on the same day on which it was rendered, for he cannot afterwards; though he may afterwards correct its phraseology by inserting other more apposite words, which do not however, weaken the force, nor change the meaning of the judgment itself, (2)

(1) *R. ll. 1. & 2. tit. 17. b. 4.*

(2) *R. l. 52. tit. 5. b. 2.—ibid. l. 39. tit. 2. & l. 20. tit. 9. b. 3—
ibid. l. 10. tit. 17. b. 4.*

LAW 4.

In what cases a judge can alter or revoke a judgment which he had rendered himself. (A)

(Not in force.)

LAW 5.

When and how a judgment ought to be rendered.

The judge must render his judgment in the day time and not the night, after citing the parties to come and hear it pronounced. And if they had not been cited to that effect, he cannot render it, though he were fully acquainted with the nature of the cause. And if upon such citation, both, or one of them only appear, he may proceed to render judgment, if he conceived he fully understood the merits of the suit. But he ought first to cause the judgment to be written in the records; and should then read it publicly, if he knew how to read, being in a sitting posture in the place where he usually hears causes, or in any other suitable place. And his judgment ought to be expressed in proper and apposite words, so as to leave no doubt whatever of its meaning: and it should above all, distinctly specify, whether the defendant were acquitted or condemned in the whole amount of the demand, or a part of it only, according as had been proved and made appear to him: or he may make use of other proper words such as he may think the case requires. But

(A) This law gives the judge the power to revoke certain judgments, rendered in criminal cases, or by default, under conditions therein expressed. Both cases being provided for by statute, a translation of the law is deemed unnecessary.

if the judge should not know how to read well, he may cause his judgment to be read by another person in his presence : for it will be sufficient for him, after it is read, to pronounce those words in which its force and substance consists : as that he acquitted or condemned the defendant in the cause. (1)

(No other part of this law in force.)

LAW 6.

What judgments are valid, though not reduced to writing.

(Not in force.)

LAW 7.

In what cases the judge may decide summarily, without entering into the merits of the cause.

The judge should render his judgment, as we have before said, after a full investigation and knowledge of the truth of the cause. But there are cases which he may hear and determine concisely without such full investigation : as where an orphan under fourteen years of age, or another person for him, petitions the judge to be put into possession of his father's estate, as heir thereto ; and he who is in actual possession answers, that the orphan is not the child of the person he pretends he is, and that he is not therefore entitled to the possession of the estate : such a cause as this, the judge ought to hear summarily ; and if he finds there exist any reasons or presumptions, though not conclusive or clearly proving the fact, that the orphan is the child of him whose estate he demands, he may order him to be

(1) *R. l. 24. tit. 5. b. 2—ib. l. 1. tit. 17. b. 4.*

put into possession of it. Yet the adverse party will still have the right to shew that he is not the child of the father he claims; though a suit can not be instituted therefor, before the orphan had reached fourteen years of age, unless he consented to answer to it. And this law was provided by the ancient sages for the benefit of the minor. For if his guardian thinks it would be for his interest to enter upon the suit immediately, because he then had good proof, or because his witnesses were aged, or were about to go to foreign parts; he may, at his option, do it immediately. But if the minor were assailed with enemies, or persons who hindered him from obtaining his rights, and had not then such proof, or could not then make such defence as was necessary to him; he may abstain from answering to the suit, until he shall have arrived at the age above mentioned; maintaining himself in the mean time out of the estate put into his possession: and when he had arrived at that age, he will be better able to defend himself, or to do it through his friends and relations. And so we say, where a woman who is pregnant by her deceased husband, petitions the judge, in the name of the child yet in her womb, to be put into possession of the estate that belonged to the deceased, and they who are in actual possession deny that she was his wife, or that she is pregnant by him: in such case, if she furnish any proof or presumption that she was his legitimate wife, and that she is pregnant by him; though the proof were doubtful and did not clearly establish the fact; yet she ought, by a decree of the judge, to be put into possession of the estate she demanded, in the name of the child; and she may enjoy it and main-

tain herself thereby. But they who are in actual possession, will still preserve their right to shew afterwards, by any legal means, that she was not entitled to the estate, in manner claimed by her. And so we say, where the son sues the father for subsistence, and the father refuse, denying that he is his son: such a cause as this, the judge ought to decide summarily, in the same manner as in the instances above mentioned; and we likewise say, that where any one petitions to be put into possession of the property of his adversary, because he had failed to answer; the judge ought, before he grants his request, to enquire summarily into the plaintiff's right, either from the title which he exhibits, or by exacting an oath from him, that he does not make the demand fraudulently: whereupon he may order him to be put into possession, in the manner we prescribed in the laws which spoke of that matter. And so we say, where the plaintiff prays that the defendant may be decreed to bring before the judge the moveable thing he claims; and the defendant reply, that he is not bound to produce it, because the plaintiff has no right to it: such a dispute ought to be decided summarily, by exacting an oath from the plaintiff that he requires the exhibition of the thing, because he believes he has a right to it: and thereupon the judge ought to render a judgment ordering the thing to be exhibited in the manner we have above spoken of, in the laws which treated of that matter. And we also say, that when the judge, on account of a debt, orders the plaintiff to be put into possession of the defendant's estate, and a third person oppose it, alledging that the property does not belong to the defendant:

then he who makes the delivery, ought to enquire summarily into the truth of the matter, and if he found that the property did not belong to the defendant, he should leave it and take other property. And we also say, that if any one were to order by his will, that any particular thing should be given to another; as a vineyard, a tract of land, or other object, and annexed thereto a certain condition, or fixed a certain day when it should be delivered: if before the condition happen, or the day arrive, the legatee demand security of the person in possession of the legacy for the faithful delivery of it, when the day shall arrive, or the condition happen, as ordered by the testator; and the other party refuse to do it, alledging that the demand was maliciously made: such a dispute as this, should be decided summarily by the judge, without much delay, in the manner we have prescribed in the cases spoken of above. (A)

LAW 8.

That the judge ought, in his judgment, to condemn the party cast, to pay the costs he had caused his adversary to incur.

It is but just that they who maliciously institute suits for a thing to which they know they have no right, and thereby drag their adversaries into court, causing them to incur heavy costs and expences, should not remain unpunished, in order to deter others from doing the same thing. Wherefore we say, that they who institute or defend such suits, without any

(A) It being doubtful whether any, and what portion of this law was in force, the translators have thought best to give the whole of it.

just cause, shall not only loose them, but be moreover condemned to pay the other party, all the costs he had incurred thereby. But if the judge thinks the party cast had any just grounds for instituting or defending the suit, then he ought not to be condemned to pay the costs. As where he appeared as either plaintiff or defendant in a cause relative to a succession he had inherited, or relative to a thing which had been given to him, or which he had acquired by purchase or exchange, in good faith, believing that the person from whom he obtained it, had the power to alienate it. For it is to be presumed, that they who institute or defend such suits, act in good faith, believing they have a right to do so. (1)

(No other part of this law in force.)

LAW 9.

Where, and how, the judge may render his judgment, in the absence of the plaintiff.

The plaintiff is sometimes unwilling to proceed any further in a cause after issue joined, and abandons it through negligence or malice, knowing he has not the means to support his pretensions. In such case, we say, that if the defendant pray the judge to proceed in the cause, he shall summon the plaintiff to appear before him and follow it up to judgement. And if he does not appear at the time appointed, the judge shall carefully examine the records in the suit; and if he find the plaintiff has already had sufficient time to es-

(1) *R. l. 14, tit. 8. l. 2.—l. 7. tit. 17. & l. 1 tit. 22. b. 4.*

establish his claim, and had not done it ; or if the evidence he had produced had not clearly proved the debt ; then the defendant shall be acquitted of the principal cause of action. But if the judge discover from the records, that the plaintiff has not had sufficient time to establish his pretensions ; or if any other doubt arises from inspecting them, which prevents him from rendering judgement, he may then discharge the defendant from answering any further in the present suit ; but can not acquit him of the principal cause of action. He ought moreover to condemn the plaintiff, for not following up his suit, to pay all the costs and expenses the defendant had incurred thereby. But if the plaintiff chose, he may afterwards institute another suit, founded upon the same cause of action, provided he previously pay the defendant his costs, as he had been adjudged : nevertheless, he can not avail himself of any thing contained in the records of the first suit, as the defendant had been fully acquitted thereof. But if the judge discover from the records, that the plaintiff, though not present, had well and clearly proved his claim ; and the defendant require him to render his judgment, he may do it accordingly and condemn the latter in as much as was proved against him, notwithstanding the plaintiff were contumacious, and had not appeared at the time appointed. And in as much as the defendant had been obedient by following up his cause, and the plaintiff contumacious ; we think it just, and we ordain, that the judge deduct as much from the principal sum in which he may condemn the defendant, as shall amount to the costs and expenses he had incurred in prosecut-

ing the suit to judgment, and that he render sentence against him for what remains after such deduction. (1)

LAW 10.

When a judge may render his judgment in the absence of the defendant.

We have shewn in the preceding law, how a judge may render his judgment, in the absence of the plaintiff, after issue joined in the cause. We will now shew how he may render it in a cause in the same situation, where the defendant has fled, or is unwilling to appear before him, either personally or by attorney. And we say that if the plaintiff, in such case, pray the judge, to render judgment against the defendant for neglecting to appear, either personally or by attorney; then the judge shall summon the defendant to come forward on a day fixed and prosecute his suit to judgment: and if he does not appear accordingly, then the judge ought carefully to examine the records in the cause; and if he finds that the plaintiff had clearly established his claim, he ought to render judgment for the amount thereof, against the defendant, though he were not present. But if it should appear from the records that the plaintiff had not fully proved his demand, and he should nevertheless pray that judgment might be rendered, without producing any other proof, then the judge ought to absolve the defendant, and condemn him to pay costs for his disobedience in not appearing. Yet if in such case the plaintiff pray the judge not to render a final judgment; but to put him

(1) R. ll. 1, 2, & 3. tit. 11. b. 4.

in possession of the defendant's property, or of the thing in dispute, on account of his failing to answer and for his disobedience in refusing to appear, the judge ought accordingly to put him in possession in the manner prescribed in title 8 of this partida, (1)

LAW 11.

What judges must do when they doubt how they ought to render their judgment.

To doubt is to approach the truth, as was said by the wise men of antiquity. We therefore say, that when judges doubt what judgment they should render upon the proof and law exhibited by the parties, they ought to lay the matter before well informed and impartial men of the place where they preside, and take their advice. And if, by their assistance, their doubts are removed, they ought to render judgment in the manner above mentioned. (A) (2)

LAW 12.

What judgments are not valid.

Judges sometimes err in their judgments, as doctors do in the medicine they administer to their patients; giving sometimes more or less than they ought; or when intending to give one remedy, give another that aggravates the disease. So do judges sometimes render senseless and unjust judgments, or such as the

(A) So do the judges of England and the United States, call for assistance from the bar, in matters of difficulty or doubt.

(1) *R. ll. 2 & 3. tit. 11. b. 4.*

(2) *R. ll. 3 & 17. tit. 1. & l. 3. tit. 5. b. 2.*

nature of the case did not require. And that they may guard against such errors, we will here explain what judgments are invalid, on account of the person of the judge, or for having been rendered in a manner different from what they ought to have been. A judgment is invalid, on account of the person of the judge who rendered it, when he was one of those whom the laws of our code prohibit from deciding causes, as we have shewn in the title of judges ; and so it would be, if the power of determining causes had not been granted to him. A judgment would be rendered in an improper manner and void, if pronounced by the judge standing on his feet, without being peaceably seated in his place : or if he deliver it without first causing it to be written, as we have shewn in the preceding laws which spoke of that matter (*a*) ; or if it be contrary to nature, to good morals, or the laws of this book, as is above said (*b*) ; or if it had been rendered against a person who had not been previously cited to hear it pronounced : or at a time in which it is prohibited to decide causes, as is said in the title of this book which treats of holy days (*c*) : or in an improper place, as a tavern or other place unfit for a judge to preside in : or when rendered out of the jurisdiction of the judge, in a place where he had not the power to decide causes : or if rendered concerning spiritual things which ought to be determined by holy church : in all these cases a judgment so rendered shall be void. And so we say it would be, if rendered against a minor under twenty five years of age, or against a mad

(*a*) Law 5 & 6, of this title. (*b*) Law 1, of this title. (*c*) Part. 3. tit. 2. l. 34, &c. &c.

man, or an idiot without their guardian being present to defend them, that such judgments would be void, unless advantageous to these persons. And so we say, that a judgment rendered against a slave, when his master was not present to defend him, would be void, unless it were concerning a thing which he held in the name of his master, and of which he had been dispossessed: or unless it were concerning some other matter in which the slave could appear as either plaintiff or defendant, without authority from his master, as we have said in the laws of this book which treat of that subject: for in such cases, the judgment would be valid, and can not be annulled because the master was not present, (A) (1)

LAW 13.

When a second judgment, repugnant to the first, is not valid.

When a judgment is rendered against one of the parties, and neither of them appeal from it: and the same parties afterwards institute another suit for the same cause of action, and in the same manner, and a judgment be thereupon rendered, repugnant to the first: we say, that the second judgment shall not be valid. But if a dispute arise about the first judgment, one of the parties contending that the judge ought not to hear the cause, as it had already been once decided: if the

(A) Whether the recourse of nullity against final judgments, as it prevailed under the Spanish government, can still be had under the laws of Louisiana, is a question not settled by any judicial decision. See 4 Mart. rep. Meekin's ass. vs. Williamson et al. Syndics.

(1) *R. U. 2 & 10. tit. 17, b. 4.*

other deny the fact, and the judge before whom the dispute arose, decides that the first judgment was not rendered upon the same cause of action: the second judgment rendered afterwards, repugnant to the first, shall be valid, notwithstanding neither of the parties had appealed from the first: provided also, that no appeal had been taken from the second, and it had not been reversed by the judge of appeals. There are besides, other causes in which a second judgment is valid, though repugnant to the first: as in causes relating to marriages: for if after the judgment is rendered, it could be proved that it were founded on error in fact, then a second judgment may be rendered, repugnant to the first. Also every judgment obtained upon the testimony of false witnesses, or upon forged documents, or by any other sort of forgery; or by corrupting the judge with money, or presents, may be annulled at any time, within twenty years, though the party cast had not appealed from it, on his shewing the false testimony or corrupt means by which it was obtained: otherwise the judgment will stand good. For it may easily happen, that forged documents and false witnesses may be brought before the judge, mingled with others that are authentic and worthy of belief; and that he may found his judgment upon the good, and reject the bad. Therefore, unless the party who attacks the judgment, can explicitly prove that it was rendered upon such false evidence, it can not be shaken.

(No other part of this law in force.) (1) (A)

(1) *R. ll. 2, & 10. tit. 17. b. 4.*

(A) *Licet non valeat sententia definitiva lata contra aliam sententiam definitivam, quæ non fuit appellationi interposita suspensa;*

LAW 14.

That a judgment rendered conditionally, or upon the authority of another judgment is not valid.

Judges ought not to render conditional judgments: if they do, and the party cast appeals, such judgments may, on that account, be revoked by the judge of appeals. But if neither of the parties appealed, the judgment cannot be afterwards annulled on account of its having been rendered conditionally. We also say that no judgment shall be valid which is rendered upon the authority of another judgment: unless upon the authority of a judgment rendered by the king, whose decisions may serve as examples to follow in other cases, as they have the force and effect of law in the instances in which they are rendered, and in all others of a similar nature, (A) (1)

si tamen partes contenderint, super prima sententia, an lata fuit, vel non, et judex in tali contentione pronuntiet, non fuisse aliam sententiam primitus promulgatam, et partes not appellent, vel si appellent, confirmata sit sententia; prima manet invalida. Idem est in causa matrimoniali, in qua sententia non transit in rem judicatam, si postquam lata est, facto possit probari per errorem latam: nam tunc probato errore, potest sententiari contrariam. Idem si judicium datum sit per falsos testes, aut per falsa instrumenta, aut per aliam falsitatem qualemcunque; vel si pecunia, aut dono probetur judicem fuisse corruptum: nam potest usque ad XX. anos retractari: sed oportet tunc probare, quod judex illorum prætectu pronuntiaverit. Item si per juramentum a judice delatum pars jurans obtinuit per sententiam, potest ipsa prætectu instrumentorum postea repertorum retractari: Hoc dicit. *Greg. Lopez.*

(A) The last sentence of this law is necessarily translated to explain what precedes.

(1) *R. l. 21. tit. 6.—l. 4. tit. 6, & l. 4. tit. 7. b. 2.—ib. ll. 23, 24 & 79. tit. 4. b. 3.—ib. ll. 2 & 10. tit. 17. b. 4.*

LAW 15.

That a judgment is not valid, which is rendered against a person, not of the jurisdiction of the judge who rendered it.

Judges sometimes compel defendants to appear before them, who are of another jurisdiction, where the former have no power to hear and determine causes. We therefore say, that every judgment rendered in such cases, shall be void. And so it would be where the parties through error, submitted their cause to a judge who had not the authority to decide it: a judgment rendered in such case would not be valid. We also say that a judgment rendered against a person who is dead, is not valid: because he had then passed under the power of another judge, who is to pronounce upon all mankind (*a*). We likewise say, that a judgment rendered concerning a thing for which no suit had been instituted, or answer made, is not valid, as we have shewn in the laws which treated of that matter (*b*). And so we say it would be, where a judge inquired into the truth of the facts in a cause, after he had rendered his judgment, without having known them before: such judgment will not be valid. For regularly, according to what we have prescribed in this code, every judge should first fully investigate and learn the facts of a cause to the best of his ability, and then render his judgment as he thinks he is bound to do. Likewise a judgment is not valid in which the defendant is neither absolved nor condemned. For such expressions, or others similar to them, ought to be contained in

(*a*) See the limitation to this rule, part. 3. tit. 5. l. 23.

(*b*) Part 3. tit. 10. l. 3. & l. 5.

every final judgment according to the nature of the case, as we have above shewn. (A) (1)

LAW 16.

That a judgment rendered concerning a thing not demanded is not valid.

The judge must carefully examine into the object in dispute between the parties; into the manner in which the action is instituted, and above all into the nature of the proof, produced in the cause; after which he may render his judgment. For if the suit be brought for a field or a vineyard, and he were to render his judgment for a house or for an animal; or for any other thing not appertaining to the cause; such judgment would not be valid. And so we say it would be where the suit was for the *property* of a thing, and the judge determine upon its *possession*. We likewise say, that if the plaintiff bring suit for a horse or a slave which had been bequeathed, or promised to him, without particularly specifying what horse or slave; and the judge thereupon condemn the defendant to give the plaintiff such a slave, designating him by name, or such a horse, designating him by his colour, or shape; such judgment would not be valid: for as the demand was of a general nature, the judgment ought to be rendered in the same manner. We likewise say that where a suit is brought for the damages

(A) ll. 2 & 5. *supra*.

(1) *R. ll. 2 & 21. tit. 5.—l. 4. tit. 6, & l. 4. tit. 7. b. 2—ib. l. 27. tit. 1. & l. 30. tit. 2. & ll. 23, 24, & 79. tit. 4. b. 3.—ib. ll. 2 & 10. tit. 17. b. 4.—ib. l. 1. tit. 1. b. 8.*

done by any animal or slave, to the field, vineyard or other property belonging to another: and the plaintiff pray that the master may pay the amount of such damages, or deliver up the animal or slave that caused them, in satisfaction thereof: if he prove the fact, the judge must render his judgment in the same manner the demand was made, thus; “ I order the defendant
‘ to pay so much in satisfaction of the damages caused
‘ by his animal, or slave, to the property of such a one ;
‘ or that he deliver up to the plaintiff, the thing which
‘ caused the damage.” For if the judge determine otherwise, and condemn the defendant to do one or the other specifically; such judgment would not be valid. And this rule must be observed, not only in the case above mentioned, but in every other of a similar nature. We also say that if the judge does not declare in his judgment, with certainty, the thing or sum for which he condemns or absolves the defendant: as if he were to say thus: “ I order the defendant
‘ ant to pay or to deliver to such a one, what he de-
‘ mands: or I condemn him in the suit brought against
‘ him; or I acquit him of it: or I think it right that
‘ he should not give the plaintiff what he claims:” or if he make use of any other similar words from which it may be inferred with certainty, that the defendant is absolved or cast in the cause: if in such case the thing or sum in dispute be written in the records; then the judgment rendered in any of the above mentioned ways, would be valid. But if in the records of what passed before the judge, no certain mention is made of the demand; then the judgment

in which was not specifically mentioned the thing or sum for which it was given, would not be valid. (1)

LAW 17.

What opinion ought to prevail, where there are two or more judges acting together, and they disagree, as to the manner in which their judgment should be rendered.

It is very natural, that when many persons are joined together, they should disagree; especially when they have to render a judgment in a law suit. We therefore say, that if two or more judges are appointed to hear any cause, or to hear all causes generally; or to act as arbitrators, and being all present, they disagree as to the manner of rendering their judgment; then the opinion of the majority should prevail, and not that of the minority. But if they all agree to render judgment against the defendant, and disagree among themselves as to the amount; part being for a greater, and part for a less sum; then we say, that if they were equally divided, the judgment rendered for the less, and not for the greater sum, shall be valid. And this for two reasons: the one because they all agreed upon the less sum: the other, because judges ought ever to be compassionate and mild, and more inclined to acquit and absolve the defendant, than to condemn and oppress him. But if the judges were appointed to hear any particular cause, and they entirely disagree among themselves, being as many on one side as the other, and giving different judgments; some condemning, and the others absolving the defendant; then we

(1) R. ll. 2 & 10. tit. 17. b. 4.

say, that neither of their judgments shall be valid, until seen by the person by whom they were appointed, and he select and confirm whichsoever of them he may think proper. (a) And we finally say, that where judges are ordered to hear and determine any cause jointly, they must all be present at the time when judgment is rendered; and if either of them were absent, whatever is determined by the others, will be void, although the one absent should have written to the others, that he were willing they should render their judgment without him. And the ancient sages esteemed this a wholesome provision, for this reason: that peradventure, if the absent judge had been present at the time judgment was given, he might have urged such reasoning or advice, as would have caused them to render quite a different one. But, if he who had given the judges the power to decide, had authorised them to give their decision separately, then the judgment rendered by them, in the manner prescribed, would be valid. (B) (1)

LAW 18.

What opinion ought to prevail, when the judges disagree among themselves, as to the judgment they should give on a question of liberty or slavery, or in a criminal cause.

Liberty is a blessing naturally grateful to all. And as wise men have said, all laws should protect it when-

(a) Loquitur hic de iudicibus delegatis, &c. *Greg. Lopez.*

(B) If this law is not applicable in all its parts to the judges of our courts as they are now organized, it may well apply to arbitrators and referees.

(1) *R. l. 7. tit. 4. & ll. 43, & 44. tit. 5. b. k.*

ever an opportunity presents itself, or occasion requires their interference. We therefore say, that whenever two or more judges assemble together, to determine a question of liberty or slavery : and at the time of rendering their judgment, they disagree among themselves, being equally divided ; the one being inclined to decide in favor of liberty, and the other of slavery ; then the opinion in favor of liberty shall prevail and not the other. (1)

(No other part of this law in force.)

LAW 19.

What force a judgment has.

A final judgment rendered between the parties according to law, and from which neither of them had appealed, within the time prescribed in the title of appeals, has such great force, that both they and their heirs, are forever thereafter bound by it. And so we say, it would be, if they had appealed, and the judgment had been confirmed by the sentence of a competent superior tribunal. Yet if any thing should afterwards happen to destroy its force, it will cease to have effect, either against the parties or their heirs. As if any one had lent another, an animal or other thing ; or had given a workman any thing to work up or repair, and he had lost it through his own fault, and the judge had thereupon condemned him to pay its value. If afterwards such thing had come again into the power of the owner, the defendant may require him to refund the money he had received : and in this manner the

(1) *R.l. 43. tit. 5. b. 2.*

force of the judgment would be destroyed, though no appeal had been taken from it. And we also say, that if the party cast, had not already paid the sum in which he had been condemned for the thing lost, he may excuse himself from paying it, the moment the thing had come again into the power of the owner. We also say, that such is the force a of final judgment, that it cannot be invalidated on account of any error of calculation made by either of the contending parties, in whatsoever manner it may have happened, if no appeal had been taken therefrom. But if the error were committed by the judge who pronounced the sentence : as if he had said, “ I condemn the defendant to pay the plaintiff, one hundred maravedis which he owes him on such account; and the further sum of fifty maravedis which he owes him on such other account ; making both together the sum of two hundred maravedis ;” such a judgment would be valid for no more than one hundred and fifty maravedis, and not for the overplus which proceeded from error : and so of every other judgment containing errors similar to these. We likewise say, that a judgment once rendered, from which no appeal is taken, cannot be invalidated, not even by producing notarial acts or privileges, discovered since it was rendered, which were of such a nature, that had the judge seen them before he gave judgment, he would have decided differently ; unless where the judgment had been rendered upon the oath of one of the parties ; for in that case, it may be invalidated by the discovery afterwards, of notarial acts or privileges, as we have above shewn

in the title which treats of oaths. (a) And lastly we say, that such is the force of a judgment, that the heirs of the party in whose favor it was rendered, may avail themselves of it, in the same manner that the party himself could do ; as may also, all those to whom was legally transferred the ownership of the thing about which it was rendered : and on the other side, it will prejudice the heirs of the party against whom it was rendered, in the same manner it would the party himself. Likewise we say, that a judgment does not lose its force by the death of the judge who rendered it : on the contrary, his successors are bound to observe it and carry it into execution. So we say, they are bound to observe every thing else, legally determined by the deceased judge, before his death. We also say, that there accrues in favor of the person for whom the judgment was rendered, a right by which he can demand the thing for which it was rendered, at any time within thirty years, either of the party cast, his heirs, or any other person in whose possession he may find it ; unless the latter can shew he has a better right to it than the person who claims it. We likewise say, that if the defendant be absolved of the thing demanded of him, by a judgment in his favor : he and his heirs will be forever protected thereby, as well against the plaintiff and his heirs, as against all other persons who claim for them, or in their name (1)

(a) l. 15. tit. 11. ead. part.

(2) R. l. 6 & 8. tit. 17. & l. 4. tit. 21. b. 4. — *ibid.* l. 19. tit. 24. b. 9.

LAW 20.

That a judgment rendered between the parties can not prejudice third persons, unless in certain cases.

It is lawful and just, that a judgment, rendered against one person, should not prejudice another. We therefore say that if any one who is owner of a field, or vineyard, or other thing, or who has any right to it, should see or know that another had brought a suit for it, against a third person then in possession, and that judgment had been rendered for the plaintiff: nevertheless, such owner may afterwards claim the thing, wheresoever he finds it, and he shall not be prejudiced by the judgment rendered, as the person in possession, and who defended the cause, had not done it by his order. And we likewise say, that if one of the heirs of a debtor be sued and the plaintiff establish his claim by proving the debt to be due from the deceased, and thereupon judgment be rendered against the heir; such judgment shall not prejudice the other heirs, though given with their knowledge, and without any opposition on their part. So we say it would be, where one of the heirs of the creditor instituted a suit for a debt due the deceased, with the knowledge of the other heirs, and without their making any opposition to it: for though the plaintiff be cast, the judgment against him, shall not prejudice the other heirs, as to the share of the debt they are entitled to, as being a part of the succession of the deceased; and though we here say, that a judgment rendered against one heir shall not prejudice the others; yet there are cases where it is otherwise; as where two men become indebted to another, for the same thing, each for the

whole amount: or where a field, or vineyard, or other thing had been promised to two persons, so that each of them could claim the whole: for a judgment rendered against one of the co-debtors or co-creditors, in either of these cases, will prejudice the others though they were not parties to the suit. We also say that if any one holds a thing in pledge, and he sees or knows that the pawner is engaged with a third person in a suit about the ownership of it, and he make no opposition to it: if in that case the pawner be cast, the judgment rendered against him shall prejudice the pawnee, and he will be obliged to deliver it up to the successful party. And so we say it would be, if the pawner had lost the cause before he had pledged the thing; but if he had entered into a suit concerning it, after he had pledged it, without the knowledge of the pawnee; the latter will not then be prejudiced by a judgment rendered against the pawner. We likewise say, that if any one sees or knows that his father-in-law or mother-in-law are engaged in a suit concerning any thing they had given his wife in marriage, and he make no opposition to it, and judgment go against them, the husband will be prejudiced thereby. For it will be presumed that it had been done with his consent, since he knew of the suit and did not interfere. And so it would be if the buyer did not interpose when he saw, or knew, that the seller, was engaged in a suit concerning the thing sold. For if judgement be rendered against the seller, it will prejudice the buyer, notwithstanding the seller may be bound to indemnify him. We likewise say, that where a man brings a suit against any one, claiming

him as his slave; and the master knows of it, and makes no opposition or defence, but remains silent and suffers the proceedings to go on and the defendant to claim his freedom: any judgment rendered therein, either declaring the defendant to be free, or that he was the slave of the plaintiff, will prejudice the master so that he can not afterwards claim him as his slave. And so we say it would be if the defendant were a vassal or a freed man. And we likewise say, that if any one claims another as his father, and the latter be unwilling to acknowledge him; and judgment be rendered against the father, declaring the person to be his son whom he refuses to acknowledge: such a judgment will prejudice the father and all his relations, as it regards the estate they might inherit from him, though they were not present when the judgment were rendered, and the father alone had been a party to the cause. And so we say it would be where the son disowns his father, for if a judgment be rendered against the son, it will not only prejudice him, but all his relations who may wish to oppose it. Likewise we say, that if any one disinherits by will, without law or reason, either his children or grand children and bequeaths his estate to other heirs, and judgment be thereupon rendered against those who defend the will; not only shall the testamentary heirs be prejudiced thereby, but every one to whom the testator may have left a legacy. And this provision of law applies, where the father gives no just cause in his will, why he disinherits his children, as we shall hereafter shew, in the laws of this book which treat of that matter. (a) And so we

(a) Part. 6. tit. 17.

say the same thing must be observed in every cause instituted by all or each of the inhabitants of a town, as when any one erects new works in the commons of a town or city, or in the public road or river or in any other similar place, and one of the inhabitants bring suit against him who erected the works: if judgment be rendered in favour of the defendant, he cannot afterwards be sued by any other inhabitant of the place for the same cause of action; unless fraud had been practiced in the suit, as we above said; for then any one that chooses, may sue him again. (1)

LAW 21

When a judgment rendered between the parties, may turn to the benefit of third persons.

When judgment has been rendered in a suit concerning a house, vineyard, or any thing else whatever; not only may the successful party avail himself of it; but likewise his heirs and all other persons to whom the property in the thing upon which the judgment was rendered, may be transferred, either by legacy, purchase, donation, exchange, or by any other legal means. And so we say, it will prejudice not only the party against whom it was rendered, but likewise his heirs and all persons who claim under him. We also say, that where several persons are joint owners or partners of an estate, or of any thing else which they own in common, and one of the partners bring a suit against their neighbor, alleging that his field, or house,

(1) *R. l. 1. tit. 16. b. 5.*

or inheritance owes a service to the estate of the plaintiff and his co-partners, and judgment be thereupon rendered against the defendant; it will not only avail the plaintiff, but all his co-partners likewise: but if it be rendered against the plaintiff, it will not prejudice his co-partners, as they were not parties in the cause, either in person or by attorney: and they will have the choice, either to abide by, or oppose such judgment, though rendered in a suit undertaken by their co-partner, without their command. And we likewise say, that where judgment is rendered against several persons interested in a cause, and one of them only appeals; or if they all appeal, and one of them only follows up the cause until judgment be rendered in his favour, and the first sentence reversed; it shall operate to the advantage of them all, as well as of him who followed up the appeal,

(No other part of this law in force.)

LAW 22. ♦

What are the orders rendered by judges, which have not the force of judgments.

All orders or decrees rendered by judges, have not the force of judgments. And we therefore say that if any one complain to a judge, that another owes him any thing; and the judge thereupon issue an order against the party complained of, commanding him to give, or to pay, or to deliver to the complainant the thing he claims, without having previously summoned him, or enquired into the truth of the matter, as we have above shewn: (a) such an order shall not be valid,

(a) l. 12 & 15 codem tit.

nor have the force of a judgment. We also say, that if a judge give any new order, annulling or changing a final judgment which he had already rendered, such order shall have no effect. We likewise say, that when a judge condemns one of the parties to pay or deliver by a certain day, the sum or thing claimed by the other, and on his failing to do it by the time fixed, to pay double the amount: then, that part of the sentence, which relates to double the amount, will not have the force of a judgment, but is rather a menace of the judge, and will not prejudice the party against whom it was rendered, for any more than the principal sum: unless such menace were contained in a judgment or suit, in behalf of a minor against the guardian of his person and property. For if the guardian did not pay at the time fixed by the judge; such menace would have against him, the force of a judgment, and he will be obliged to pay the penalty and double amount, as well as whatever the judge may have condemned him to pay, or to deliver. (1)

LAW 23.

What reward is due to judges, who faithfully discharge the duties of their offices.

Judges who well and faithfully discharge the duties of their offices, deserve to be rewarded two fold. First, by the good name and reputation they acquire, and the love and honor bestowed, both by sovereign and people. Secondly, by the lucrative salaries they receive, and the honors conferred on them, by entrust-

(1) *R. l. 2. tit. 13. b. 4—Ib. see the laws of the tit. 14. b. 4.*

ing and appointing them in different places, to administer justice to the people : to which we may add, the hope of further reward in this, and the world to come, for the good they do. Wherefore judges ought to strive to be good, upright men, and free from prejudice, as has been said in those laws which treat of that matter. (A) (1)

LAW 24.

What penalty a judge deserves, who knowingly, or through gross ignorance, decides erroneously in a civil cause.

The judge who knowingly pronounces contrary to law, commits a crime, as also does the person, who gives, or promises him a reward, for so doing. We shall therefore declare, what penalty they both deserve. And first we will speak of the judge who knowingly errs through dislike, towards the party against whom he decides, and through affection for the other, but not for any reward he may have received : if the judgment were for a moveable or immovable thing, or for any thing else, not appertaining to criminal or corrective justice ; we deem it proper, and we declare, that he shall pay out of his own effects, to the party injured, as much as he caused him to lose by such judgment ; as well as all the loss, damages, and expenses he had incurred thereby ; and he shall be forever afterwards considered as infamous, for having violated the oath he took, on entering into office ; and above all, he shall forever be deprived of the power of judging again, for having

(A) l. 1 & 3. tit. 4. cod. part.

(1) R. l. 7. tit. 7. b. 3.

abused the trust reposed in him. But if peradventure, he had rendered an unjust judgment in any of the above mentioned causes, through gross ignorance, or want of a knowledge of the laws; he shall not incur any other penalty, according to the good pleasure of the king's court, than to pay the party cast, all the loss and damages he had sustained by such unjust judgment. And he ought above all, to justify himself by swearing, that he had not rendered the judgment with wicked intentions; but through error, and from a want of a right understanding of the laws. But if he had rendered an unjust judgment, on account of any reward that had been given or promised him; he shall, over and above the aforementioned penalty incurred by a judge who knowingly decides wrong, pay to the king three times as much as had been given or promised him. And if he had received nothing, he shall pay double to the king; and the judgment thus sold for a price, shall not be valid, notwithstanding the party cast had not appealed from it. (1)

LAW 25.

What penalty is incurred by a judge, who knowingly renders an unjust judgment in a criminal cause.

(Not in force.)

LAW 26.

What penalty he deserves, who gives any thing to a judge to induce him to render an unjust judgment.

(Not in force.)

(1) *R. l. 7. tit. 7. b. 3.—ib. l. 35. tit. 4. b. 3.*

LAW 27.

When a thing given to the judge to induce him to render a judgment, may be reclaimed, and when it can not be.

When a party has a bad cause, and gives any thing to the judge, to induce him to decide corruptly in his favour; or to induce him to procrastinate the suit, and not decide it at all; we say, that in neither of these cases, can the party reclaim what he had so given; but it will be sufficient, if the judge pay it to the king, as we have said in the preceding law. But if he had given the thing to induce the judge to decide justly and not wrongfully; he may reclaim it; for then the offence is entirely with the judge who received a price for doing what he was already bound to do, both by law, and his oath. But if at the time the party gave the thing, he had said nothing; or had said that he gave it, in order to induce the judge to decide; he cannot afterwards reclaim what he had thus given; because he had fraudulently attempted to excite the cupidity of the judge: nor shall it remain with the judge who had received it; for by taking it, he acted contrary to good morals, to law, and his oath; but he shall deliver it to the king, as he is entitled to every thing which judges corruptly receive, by colour of their offices. (1)

(1) *R. l. 6. tit. 9. b. 3.*

TITLES,

Of the Roman and Spanish Laws which relate to the title
of LAS SIETE PARTIDAS, on Appeals.

Digest lib. 49. tit. 1. - - *De appellationibus et relationibus.*

Digest lib. 49. tit. 5. - - *De appellationibus recipiendis vel
non.*

Digest lib. 49. tit. 10. - - *Si tutor vel curator magistratus
creatus, appellaverit.*

Digest lib. 49. tit. 11. - - *Cum qui appellaverit, in provin-
cia defendi.*

Digest lib. 49. tit. 12. - - *Apud cum a quo appellatur, aliam
causam agere compellendum.*

Digest lib. 49. tit. 13. - - *Si pendenti appellatione mors in-
tercenerit.*

Digest lib. 49. tit. 2. - - *A quibus appellari non licet.*

Digest lib. 49. tit. 3. - - *Quis a quo appellitur.*

Code lib. 7. tit. 62. - - *De appellationibus et consultatio-
nibus.*

Code lib. 7. tit. 63. - - - *De temporibus et reparationibus
appellationum vel consultati-
onum.*

Fuero Real, book 2. tit. 16.

Leyes del Estilo, ll. 13, 15, 149 to 160, included.

Ordenamiento de Alcala, tit. 13.

Ordenamiento Real, book 3. tit. 16.

Recopilacion de Castilla, book 4. tit. 18.

Autos Acordados, book 4. tit. 18.

Recopilacion de las Indias, book 5. tit. 12.

OF APPEALS.

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TITLE XXIII.

Of the appeals which the parties make, when they think themselves aggrieved by judgments rendered against them. (1)

LAW 1.

What is meant by an appeal, and what advantage arises from it.

An appeal is a complaint, which one of the parties makes of a judgment rendered against him, by applying for relief to a superior judge. And it affords this advantage, when made according to law; that by it, are redressed the injuries which judges do to the parties, either through error or misconception. (2)

LAW 2.

Who may appeal.

Every free man may appeal from a judgment, by which he thinks himself aggrieved. But a slave can not, for he is himself, as well as every thing he possesses, in the power of his master; nor can he appear in a court of justice, unless in those cases which we mentioned in the title of plaintiffs. (a) We also say, that a son under the power of his father, may appeal from any judgment rendered against him, on account of the property he has under the guardianship of his father, in whatsoever manner the son may have acquired it. We likewise say, that the guardians of or-

(1) *R* see the title 18. b. 4.—(2) *R*, l. 1. tit. 18. b. 4.

(a) Part. 3. l. 9. tit. 2.

phans ; or any attorney who acts for other persons, either as plaintiff or defendant, may appeal from all judgments rendered against the persons they represent. And so may they whom such guardians and attorneys substitute in their places, after issue joined ; for they cannot substitute them before, as we have said in the title which spoke of attorneys. (a) We likewise say, that when a judgment is rendered against an attorney acting for another person, and he does not appeal therefrom, the party himself may, though he had not personally appeared, either as plaintiff or defendant in the cause. And if the attorney neither appeals nor informs the party that judgment had gone against him ; the latter may appeal at any time within ten days after he knew it (b) : and if the attorney has wherewith to make amends, he shall pay the party all the damages sustained by his fault, for not appealing when he ought, and when he had it in his power to have done it ; and for not having given the necessary information, in due time to the party, that he might have done it himself : and then the judgment will stand, and the party can not appeal from it. And if the attorney had not wherewith to pay ; in that case the party may follow up the appeal, as we have above said. (1)

(a) Part. 3. l. 19. tit. 5.

(b) This period of time, was afterwards reduced to five days from notice of the judgment. R. l. 1. tit. 18. b. 4.

(1) R. l. 10. tit. 7. b. 2.—*ib.* l. 17. tit. 7, & ll. 14 & 19. tit. 9. 3.—*ib.* ll. 1, 3, 4 & 6. tit. 18. b. 4.

LAW 3.

That an attorney ought to appeal when judgment is rendered against him.

When an attorney has been employed in any particular cause, in which sentence is rendered against him, he ought to take an appeal; and he may afterwards follow it up, if he choose, though no power to that effect had been given him by his letter of attorney. But if he should not choose to follow it up, he is not bound to do so, yet he ought to take the appeal and notify the party thereof, that he may follow it up, if he thinks proper. Nevertheless, if a general power had been given to the attorney, to represent his constituent in all his causes; or if in the act of procuration, it had been declared specifically, that he might and should follow up the appeal; then he will, at all events, be bound to take the appeal, and follow it up accordingly. (1)

LAW 4.

That they who derive advantage, or sustain loss by a judgment, may appeal therefrom

Not only may the parties, or their attorney, appeal from the judgments rendered against them, as we have shewn, but likewise all other persons who derive any benefit, or sustain any loss thereby. As where judgment had been rendered against one for a thing he had bought, and he did not appeal; then we say the vendor may appeal, for he is bound to guarantee the thing sold. We likewise say, that if judgment be

(1) *R. l. 18. tit. 24. b. 2.*

rendered against the vendor for the thing sold, the buyer may appeal therefrom, if he choose. And we moreover say, that if the seller, against whom judgment is rendered, takes an appeal and follows it up; and the buyer suspecting that he would not act in good faith, should declare himself to that effect to the judge of appeals: then the judge ought not to proceed any further in the cause, unless the buyer were present to defend his rights. Likewise we say, that if judgment be rendered against a debtor, for a thing he had pledged to another, and he should not appeal from it, then the pawnee himself may; or if the pawner had taken an appeal, and the pawnee suspected he would not follow it up, in good faith; then the latter may appear and defend his rights in the same manner as if he had taken the appeal himself. But if the debtor had alone, without the knowledge of the pawnee, engaged with any other person in a suit for the thing he had pawned, and were cast, the pawnee shall not be prejudiced by the judgment, though no appeal had been taken. We also say, that the security may appeal from a judgment rendered against the principal, for the debt, or thing for which the security was given. We likewise say, that if a judgment be rendered against any one for a thing he had bought, and for which the seller had given him security; the person who became security, may take an appeal, notwithstanding both buyer and seller should approve the judgment. And we moreover say, that either, the father or mother, may appeal from a judgment, by which their child is declared a slave. (1)

(1) *R. see title 18. b. 4.*

LAW 5.

That if a judgment be rendered concerning a thing belonging in common to several persons ; an appeal taken by one of them shall profit the others, though they had not appealed themselves.

If a judgment be rendered concerning a thing, whether moveable or immoveable, belonging in common to several persons, and one of them appeals, and obtains a reversal of the sentence : it will profit not only him, but likewise his co-proprietors, in the same manner as if they had themselves taken and prosecuted the appeal. But if the sentence should be annulled by the appeal, on account of the minority only of one of the co-proprietors who had sued for restitution ; such judgment of restitution will not avail the others, but the original sentence from which they had not appealed, will stand good against them. Likewise we say, that if a judgment be rendered concerning a service which one house or field owes to another ; and one of the co-proprietors in common of such service, take an appeal therefrom, it will profit the others in the same manner as if they had appealed themselves : unless such service were a usufruct of a thing, belonging to several persons during their lives, or for a certain time ; for then the appeal taken by one of them, will not avail the others. And we also say, that where there are several guardians to an orphan, who institute a suit for him ; the appeal taken by one, will avail the others, in the same manner as if they had appealed themselves ; provided all of them had appeared in the suit, and in the administration of the estate of the orphan. But he who had not interfered at all in the mat-

ter, cannot take an appeal from a judgment rendered against his co-guardian; and if he did, it would not avail the other.

LAW 6.

That a person may appeal from a sentence of death or other penalty, pronounced against his relation, though not authorised by the latter,

(Not in force.)

LAW 7.

That a legatee may appeal from a judgment, rendered against the heirs of a testator.

Men make wills by which they bequeath legacies, institute heirs, and divide out their estates, agreeably to their wishes: and after they are dead, their relations bring suits against their heirs, pretending that the will is not valid, because not made according to law and justice. We therefore say, that if in such case, judgment be rendered against the heirs and they do not take an appeal from it, the legatees may, and follow it up themselves: for if the will be overthrown by the judgment against the heirs, the legacies it contained, will be void, as we have shewn in the title of wills. (a) We likewise say, that if the heirs take an appeal from such judgment, the legatees may appear and prosecute it with them; especially if they suspect that the heirs will not act in good faith, but will collude with the adversaries, for their own advantage, and to the prejudice of the legatees.

(a) Tit. 8. part. 6.

LAW 8.

That they who are appointed to fill any offices, or to guard the gates of walled towns, may appeal from such appointment.

But if any fit person be selected as the guardian of the person and property of a minor; or be ordered by the judge to take care of and administer the effects of a madman, lunatic or prodigal: from such order of the judge, he can not appeal. But if he have any lawful excuse to offer, why he should not take such guardianship upon himself; he must make it known to the judge within fifty days; and the judge shall allow his excuse, if a lawful one, as we have said in the title which treats of guardians and orphans. And if it be disallowed by the judge, and he command him by a judgment to accept the guardianship; then the party who thinks himself aggrieved by the judgment, may appeal therefrom. But if the judge of appeals finds that the party had no grounds of complaint, or that his excuse were insufficient, he ought to be compelled to receive the person and property of the orphan under his care. And he shall moreover pay all the loss and damages which the orphan or the other persons above mentioned, may have sustained for want of a guardian, from the day he was selected, until final judgment had been rendered, touching his excuse. (1)

(No other part of this law in force.)

(1) C. art. 45. p. 66.

LAW 9.

Why the party, in whose favour judgment was rendered, may appeal, and also that he who had been guilty of contumacy (rebelde) can not appeal.

The party cast, as we have above shewn, may appeal from a judgment rendered against him: so also the party in whose favour it was rendered, may sometimes appeal, as we shall explain in this law. Such would be the case where the judgment is not so full and complete as the successful party conceived it ought to be: As where the estate which he claimed together with its fruits, had been decreed to him, without its fruits: or where the party cast, had not been condemned to pay the expences which his adversary had reasonably incurred in the suit: or where any other similar judgment should be rendered, not as full as the nature of the action, the proof, or the reasonings in support of it, required. (1)

(No other part of this law in force.)

LAW 10.

That they who are absent in the army, or on a mission for the king, or for their council, at the time judgment is rendered against them, may appeal on their return.

(Not in force.)

LAW 11.

That any person may appeal from a judgment, rendered against him while he was gone on a pilgrimage to the public

(1) *R. l. 4. tit. 18. b. 4.*

schools, or had been banished from the kingdom for a crime committed.

(Not in force.)

LAW 12.

That a person, who being on his way to hear the judgment rendered, and was prevented by force from coming in time, may appeal.

(Not in force.)

LAW 13.

From what judgments an appeal does, or does not, lie.

Men sometimes appeal from judgments by which they suppose themselves aggrieved. And as some may conceive they have a right to appeal from every sort of sentence rendered against them; we will here explain what kind of judgments may be appealed from, and what not. And we say, that one may appeal from every final judgment, by which he thinks himself aggrieved: but from any other order or decree, rendered by the judge in the progress of the suit, before final sentence is given, he can not, nor ought not to appeal. And the ancient sages, by whom laws were made and justice established, thought that no appeal ought to be allowed from such orders or decrees, though the party might conceive himself thereby aggrieved, for two reasons; the one, that the principal cause might not be procrastinated and embarrassed under the pretext of appeals, founded on such grievances. The other, because at the time final judgment is pronounced, the party who conceives himself thereby aggrieved, will have it in his power to

appeal, and fully to lay before the judge of appeals, all the grievances he had received from the judge below: wherefore, no one can appeal, except from the final judgments spoken of above; notwithstanding a contrary practice prevails by the canonical law, in some countries, where the party may appeal from every sentence rendered by the judge, whereby he may suppose himself aggrieved. We likewise say that if the plaintiff and defendant stipulate between themselves, either in, or out of court, that they will not appeal from any sentence, the judge may render against either of them; neither of them can afterwards appeal, notwithstanding he may conceive himself aggrieved by such sentence.

(No other part of this law in force.) (a) (1)

LAW 14.

That an appeal may be taken from the whole, or a part, of a judgment.

When a party conceives himself aggrieved by a judgment rendered against him, he may appeal, if he choose, not only from the whole, but a part of that judgment. But this is understood, where the action is instituted for several things, and the judge had acquitted the party of some, and condemned him for others: for then he may appeal from that part of the judgment in which he is condemned, and the other

(a) The provisions of this law are in conformity with those of the statute, organizing the supreme court, and establishing courts of inferior jurisdiction. See 3. vol. Martin's Rep. Agnes vs. Judice p. 186.

(1) *R. l. 10 tit. 7. b. 2. ibid. ll. 3. & 6. tit. 18. b. 4.*

part, from which he does not appeal, will stand good. (1)

(No other part of this law in force.)

LAW 15.

That the party may appeal from an explanation which the judge gives, of a doubtful judgment.

Where the parties have doubts as to the meaning of the words of a judgment rendered between them; each interpreting them in a different sense; and they thereupon apply to the judge who rendered it, to know his understanding of it, and he accordingly gives an explanation: if then one of the parties conceives himself aggrieved by such explanation, he may appeal to the king. (2)

(No other part of this law in force.) (a)

LAW 16.

That notorious robbers, and other persons mentioned in this law, can not appeal from judgments rendered against them

(Not in force.)

(a) By the laws organizing our courts, no tribunal is established to which appeals may be taken from an interpretation of the words of a judgment, which, as well as a statute, may be sometimes expressed in doubtful language. So much of this law is translated as will shew that recourse must, at any rate, be had in the first instance, to the judge who rendered the judgment.

(1) *R. see the laws of the tit. 18. b. 4.*

(2) *R. see the laws of tit. 18, b. 4.*

LAW 17.

Who are, and who are not, the judges from whose judgments appeals may be taken.

And we also say, that where the arbitrators to whom the parties had submitted their differences, render judgment against one of them, by which he conceives himself aggrieved; he cannot however appeal from it. And the reason is, that arbitrators have not the power of determining like other judges, but act only under the agreement of the parties, who are not obliged to obey or abide by the judgment they render, otherwise than through fear of the penalty, they had stipulated between themselves. But if, after the cause were submitted to arbitrators, one of them manifestly discovers himself to be the enemy of either the plaintiff, or defendant; and the party who discovers such animosity, notify the hostile arbitrator, not to render judgment or to proceed any further in the cause: if nevertheless he should proceed to judgment, it may be annulled by the party who had thus previously notified him. Moreover, in virtue of such notification, the party who gave it, may avoid paying the penalty his adversary might demand of him for disobeying the sentence of the arbitrators, as we have shewn in those laws which speak of arbitrators. (a) (1)

(No other part of this law in force.)

LAW 18.

To whom a party must appeal, when he conceives himself aggrieved by a judgment rendered against him.

(Not in force.)

(a) ead. part. tit. 4 l. 31.

(1) R. see the laws of the tit. 18. b. 4. c. art. 33. p. 444.

LAW 19.

Who are to hear appeals, made to the king.

(Not in force.)

LAW 20.

How the king ought to determine appeals which are brought to his court by widows, orphans, and other like persons.

(Not in force.)

LAW 21.

To whom appeals are to be taken from judgments rendered by judges, appointed to determine certain causes.

(Not in force)

LAW 22.

When, in what manner, and within what time, an appeal may be taken.

(Not in force.) (a)

LAW 22

Within what time the appeal must be prosecuted.

(Not in force.)

LAW 24.

That in the time fixed for taking and prosecuting appeals, holy-days ought to be counted. (b)

In the time fixed for taking and prosecuting appeals,

(a) This law contains the following form of a petition of appeal:
 "I such a one, conceiving myself aggrieved by the judgment which you
 "such a one rendered against me, in favor of such person my adversa-
 "ry, for such a thing (particularly specifying what;) I appeal to the
 "king, or to the judges who hear appeals by his command, and I pray
 "you to grant me your letter (carta) to that effect, and a copy of the
 "judgement and records in the suit as they transpired before you."

(b.) Tempora a iudice assignata ad prosequendum appellationem sunt continua, in quibus computantur dies feriati; quibus elapsis potest

holy days, as well as others, ought to be counted. And if any one interpose an appeal at a time when he ought not, or prosecute it, after the time fixed for that purpose, had elapsed; if the other party be present before the judge of appeals, he may oppose the hearing of the appeal, and require the execution of the judgment rendered below; and if he be not present, the judge may do the same thing *ex officio*, and refuse to hear the appeal, if it manifestly appear, that it was taken at a time when it ought not to have been taken, or were prosecuted after the expiration of the time fixed for that purpose. Nevertheless if the delay fixed for prosecuting the appeal, had expired by reason of the judge being unwilling, or unable to hear it; then the appellant shall not be prejudiced thereby; but the judge shall proceed to hear it, and the party may prosecute it, in the same manner as if the delay had not expired. (1)

LAW 25.

How many appeals may be taken from the same judgment.

(Not in force.)

LAW 26.

What must be done by the party who appeals, and the judge from whose sentence the appeal is taken.

They who appeal, must be circumspect in their ex-

pars appellata si præsens est, judici dicere ne procedat, vel ea absente, debet judex appellationis ex suo officio cessare, si constat sibi de desertione, vel, ultra tempus debitum Emissa provocatione, sed si index nolit de causa appellationis cognoscere, non nocet parti temporis lapsus.

Greg. Lopez.

(1) *R. II. 2 & 11. tit. 18. B. 4.*

pressions, so that, notwithstanding they may conceive themselves aggrieved by what the judges have decided; yet they must not fail in the respect due to them, by addressing them in an improper manner; or by telling them that they had decided wrong; or by insulting them in any other manner; but must, on the contrary, ask them respectfully for a copy of the records of the suit as they transpired; of the arguments of the parties, and of the judgment rendered between them. And the judge from whom the appeal is taken, must accordingly give them, exact and true copies of what they require, without any addition or diminution, and seal the whole with his seal. (1)

(No other part of this law in force.)

LAW 27.

What is to be done by the superior judge who pronounces upon the appeal: and of the expenses to be paid by the party cast.

The first thing to be done by the superior judge who is to pronounce upon the appeal, where the parties or one of them appear before him, is to open the paper in which the appeal is written, and to examine with great attention the suit as it transpired, the reasonings that were adduced, and the judgment that was given. He must then call upon the appellant, to shew what grievences he had sustained by the decision rendered against him, which had induced him to appeal. And if peradventure, either of the parties de-

(1) *R. ll. 2. & 12. tit. 18, l. 2. tit. 19 & l. 1. tit. 20. B. 4.*

clare, that he had recently discovered new writings or witnesses which would materially aid him in his cause, and which he could not have produced before the first judge; then the judge of appeals, ought to receive them, and if he finds that the judgment was rightly rendered, he ought to confirm it, and condemn the appellant to pay all the costs incurred by his adversary, according to the custom of our courts, and to send the parties before the judge who rendered the judgment, that he might put it into execution, or proceed to the determination of the principal cause of action, when the appeal had been taken from some particular grievance only, (*agraviamiento.*) But if he finds that the party had good cause for appealing, he must correct the grievance, and decide upon the main cause of action, and not send it back to the judge who had erroneously decided. And in that case, where the first judgment is revoked, neither of the parties ought to pay costs. And if the appeal be taken from a final judgment, the judge should confirm or revoke it accordingly, as justice may require; and condemn the party to pay costs, as is above said. We likewise say, that if the judge of appeals discover that the thing in dispute between the parties had been transported away by force or fraud, or by the order of the first judge; or that its condition had been changed from what it was at the time the appeal was taken; he shall cause it to be restored back again to the place and condition in which it was. And we further say, that if the party who conceives himself aggrieved by the first judgment, declare and prove that he was deterred from taking and prosecuting an appeal, through fear of bodily harm, death or imprisonment;

his declaration ought to be received and the judge shall proceed to hear and determine the cause in the same manner, as if an appeal had been taken. (a) (1)

LAW 28.

Whether the judge of appeals can proceed in the cause or not, in case one of the parties die before judgment is rendered.
(b.)

(Not in force.) (c)

LAW 29.

What ought to be done by the judge of appeals, where the thing perishes which was the object of the appeal.

If the thing concerning which the judgment was rendered die, after the appeal; and it be of such a nature that it can be sold, though dead, for something less than when living: as if it be an ox or cow, or other like animal whose flesh and skin can be sold: the judge of appeals shall proceed to judgment in the same manner as if it were living. But if it be of such a nature that when dead, the whole of it, can not be disposed of by sale or otherwise, but only that

(a) The translators finding it difficult to separate those parts of this law that are in force, from those that are not, thought it best to give the whole.

(b) This law speaks of criminal cases where the party convicted suffers death, banishment or loss of limb; or where the punishment is mixed, affecting the person and property of the accused. But if the cause be wholly of a civil nature, the attorney of the deceased may prosecute it to judgment after the death of his constituent. Cod. part. tit. 5, l. 23, & Martin's Rep. vol. 4. p. 486.

(b) *This law refers to appeals in criminal matters only.*

(1) R. l. 14, tit. 8, B. 2, *ibid* ll. 3 & 4, tit. 9, ll. 6 & 7, tit. 17, & l. 1, tit. 22, B. 4.

part of it, which is of very little value; as if it were a horse or mule or other like animal, or a slave which when once dead, has no value: in these and similar cases, the appeal cannot be prosecuted for the thing that is dead, but for its estimated value, while living: so that if the party against whom the judgment was rendered, held it in bad faith; as if he had obtained it by theft or robbery, or of a person who he knew had no right to it; or had kept it beyond the time in which he was to have returned it to the owner, and the judge of appeals confirm the sentence first rendered against him; we think it just, and we ordain, that he shall pay the value of the thing while living, together with the fruits and rents the owner might have derived from it, had it been in his possession. But if the party cast held it in good faith, and had a just reason for defending the suit; then the appeal is extinguished by the death of the thing, if it happened by fortuitous event, and without his fault, and he will not be obliged to pay its estimated value. And we say that the possessor of a thing, may defend it in good faith, when he had acquired it by purchase, donation or exchange of the person whom he believed to be the real owner; or when he had acquired it by inheritance, or any other just title.

TITLE XXIV.

How judgments, though not appealed from, may be revoked and the cause heard anew, when the king chooses to extend that favour to either of the parties.

(Not in force) (A)

TITLES.

Of the Roman Laws which relate to the title of **LAS SIETE PARTIDAS**, which treats of the manner in which judgments rendered against minors may be rescinded.

Code lib. 2, tit. 27.—*si adversus rem judicatam restitutio postuletur*

How judgments rendered against minors may be rescinded, &c.

What is meant by restitution and what advantage arises from it, when it is granted upon the rescission of any judgment, - - - - - **LAW 1**

Who may demand restitution, in what manner, and from what judgments, - - - - - **2**

Before what judge restitution may be sued for - - **3**

(A) This title contains only six short laws, pointing out the manner in which the party aggrieved, may supplicate the king for relief, against certain judgments; a mode of obtaining relief known to the Spanish laws, under the name of **SUPPLICATION**.

TITLE XXV.

How judgments rendered against minors under twenty five years of age, or against their curators, may be rescinded, though no appeal had been taken from them.

LAW 1.

What is meant by restitution, and what advantage arises from it, when it is granted upon the rescision of any judgment.

Restitutio, in Latin, means in common speech, the putting things in the same state in which they were before any judgment was rendered concerning them. From restitution, very great benefit arises: for by it, judgments are annulled which had been rendered against minors, though no appeal had been taken from them; and then their guardians and advocates may argue anew, and correct the errors committed in the causes in which such judgments had been rendered. And this may be done, not only in those causes where judgment is given against a minor, in presence of his curator: but likewise, in those which the guardian prosecuted or defended, in the absence of his pupil. But if minors commence suits of themselves, or judgment be rendered against them, out of the presence of their guardians; such judgment will not be valid, if prejudicial to them; and therefore it will not be necessary to invalidate it, by way of restitution; for the sentence itself, and every thing done in the cause, will

be as void as if nothing had been done from the beginning. (1)

LAW 2.

Who may demand restitution, in what manner, and from what judgments.

Guardians may sue for restitution against judgments rendered against their pupils, or the pupils themselves may do it, in the presence of their guardians; or it may be done by their attorney, especially authorised to that effect. The demand must be made in presence of the party against whom restitution is claimed, or after he had been duly cited. And when restitution is accorded to a minor, his guardian, or attorney, upon any thing appertaining to the suit, or the whole of the judgment; the same advantage ought to be allowed his adversary, and the cause restored to the same situation in which it was before. For it is but right and just, since the minor is not content with the judgment, that the reasonings of his adversary should be heard in like manner with his own. We likewise say, that pending the suit for restitution, nothing ought to be done in the principal cause. And we also say, that minors can not demand restitution, except against judgments rendered against them, or their guardians, when they were under age. For though the suit had been commenced when they were yet minors; if the judgment was not rendered before they had come of age; it can not be overthrown by way of restitution, though they may, if they choose, take an appeal from it. (2)

(1) *R. l. 16. tit. 10. b. 2.—ib. ll. 5 & 6. tit. 5, & l. 3. tit. 8. b. 4.*

(1) *R. l. 3. tit. 8. b. 4.*

LAW 3.

Before what judge, restitution may be sued for.

The demand of restitution may be made before the same judge who rendered judgment against the minor, or before his superior (*Su Majoral.*) And it may be made at any time during the non-age of the minor; that is, before he shall have attained twenty-five years complete. The judge ought to accord the benefit of restitution to the minor, whenever he proves, or shews, that he had been defrauded by the suit or judgment: or when he had, through inadvertence or mistake, confessed or denied something to his prejudice; or where his advocate had not defended or prosecuted his cause as effectually as he was bound to do, or where new; documents or testimony had been discovered which would benefit his cause; or where he wished to produce any law or custom in his favor, and to which the judgment was repugnant. For unless minors or their guardians can produce in their favor, some of these reasons, the judgment rendered against them, can not be rescinded. (1)

(1) *R. l. 16. tit. 10. b. 2.—ib. ll. 5, & 6, tit. 5. & l. 3, tit. 8, b. 4.*

TITLES,

Of the Roman and Spanish Laws which relate to the title of LAS SIETE PARTIDAS, which treat of the manner in which judgments rendered upon forged writings, false testimony, or contrary to law, may be annulled.

Code lib. 7, tit. 58. - - *Si ex falsis instrumentis vel testimoniis judicatum Sit*

Recopilacion de Castilla Book 4, tit. 17, law 2, &c.

How judgments may be annulled which are rendered upon forged writings, &c.

What falsity is and how judgments may be annulled when rendered upon forged writings or false testimony - - - - - LAW 1

That the judge himself who rendered the judgment upon false testimony, may revoke it - - - - - 2

That a judgment rendered contrary to law or custom, may be revoked - - - - - 3

In how many ways a judgment may be void - - - - - 4

That a judgment is void which is rendered before issue joined between the parties, or out of the presence of one of them. - - - - - 5

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TITLE XXVI.

How judgments may be annulled which are rendered upon forged writings, false testimony, or contrary to law. (A)

(A) Sententia lata prætextu falsorum instrumentorum, vel testium, retractabitur per modum restitutionis, et citabitur ad hoc pars adversa; et probato, quod iudex eorum prætextu pronuntiavit restituitur gravatus: Hoc dicet. Greg. Lopez.

LAW 1.

What falsity is, and how judgment may be annulled, when rendered upon forged writings, or false testimony.

Falsity, (*falsedad*) according to the sages of the law, is an alteration of the truth. And though it may wear the appearance of truth, yet it has nothing in common with it, and is adverse thereto. Nevertheless judges are sometimes deceived by such appearance, and render judgment on the faith of the forged writings and false witnesses produced before them by the parties. Wherefore we say, that every such judgment may be annulled, notwithstanding the party against whom it was pronounced had not appealed from it; and for that purpose the party aggrieved, may appear before the judge, in presence of his adversary, in whose favor it was given, having cited him to that effect, and petition for restitution, praying that the judgment may be rescinded, because it had been obtained by means of false witnesses and forged writings: and upon the proof of this fact, the judge ought to rescind it accordingly. Yet where divers witnesses and documents had been produced in the cause in which the judgment was rendered: although the party should prove that some of them were false or forged; this will not suffice to overthrow the judgment; unless he clearly shew, that the judge founded his sentence upon the evidence of such false witness, or forged document. (1)

(1) *R. l. 1. tit. 17. b. 4.*

LAW 2.

That the judge himself, who rendered the judgment upon false testimony, may revoke it.

Either the judge himself who rendered the judgment upon the testimony of false witnesses or forged documents, or his superior, may revoke it, when there-to required, upon producing proof in the manner prescribed in the preceding law. The judgment may be revoked, and annulled, as well as every thing done and paid on account of it, at any time within twenty years from the day on which it was rendered. But after the expiration of that time, it will forever remain in full force. (1)

LAW 3.

That a judgment rendered contrary to law or custom, (fuero) may be revoked.

A judgment rendered against law, or the customs, (*fuero*) of the realm, is void. As where it contains something manifestly contrary to law.—As if the judge were to say “I decree that the will made by such a minor under fourteen years, shall be valid.” Or where he decrees any other specific thing, prohibited by law or custom. Such judgment will be void, though no appeal had been taken from it, and will have no more effect than if it had not been given. And so we say of a judgment rendered against nature or good morals; or by which something is decreed which it is impossible to perform. (2)

(1) *R l. 2. tit. 17. b. 4.*

(2) *R l. 3. tit 1. b. 2. 8.—ibid l. 4. tit 14. & l. 2. tit. 17, b. 4.*

LAW 4.

In how many ways a judgment may be void.

A judgment is null which is not rendered by all the judges to whom the cause had been submitted. And so it would be, if rendered after the expiration of the time which had been prescribed to them, for deciding causes in. Likewise, if any one were sentenced, for a crime he had committed, to pay a greater sum than was required by law ; the judgment would be void, as to the excess. So we say it would be, where the judgment is manifestly erroneous as to the principal sum or costs which the party had been condemned to pay. And notwithstanding no appeal were taken from such judgments, they may nevertheless be revoked at any time ; and can have no more effect than if they had never been rendered. (1)

LAW 5.

That a judgment is void, which is rendered before issue joined between the parties, or out of the presence of one of them.

Judges can not render judgment in any cause, except on appeal, unless issue be joined between the parties : otherwise it will be void. And so it would be, where they render judgment, out of the presence of the parties ; or without having previously cited them, to come and hear it pronounced ; or where it were proved that they had rendered it for money : or where they had condemned a man after he was dead, for any other crime than treason. For the judgments rendered in these, or in the other cases spoken of in the title

(1) *R. l. 8. tit. 17. b. 4.*

of judgments, are not valid, and may be annulled, though no appeal had been taken from them. (A)(1)

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code, relating to the title of LAS SIETE PARTIDAS, which treats of the manner in which judgments must be put into execution.

Code lib. 7. tit. 53. - - - - - *De executione rei judicatae.*

Fuero Real, book 2. tit. 13.

Civil Code. book 3. tit. 21. p. 490.

How judgments must be executed, &c.

What judges can put into execution those judg-

ments that are rendered according to law, - - - LAW 1

How valid judgments are to be executed, - - - 2

Upon what property the judgment must be executed 3

How a judgment rendered against several persons

for the same thing, ought to be executed, - - - 4

Within what time a judgment rendered against any

one, ought to be executed, - - - - - 5

How property taken by seizure, or in virtue of

a judgment, ought to be sold, - - - - - 6

(A) See the translators note, ANTE upon law 12. tit. 22. cad. part:

(1) R. see the laws of the title 17. b. 4.

TITLE XXVII.

*How judgments that are valid, ought to be executed ;
and who can put them into execution.*

LAW 1.

What judges can put into execution, judgments that are rendered according to law.

Judgments that are valid, may be put into execution, either by the judge himself who rendered them, or by his superior. And we likewise say, that if a judgment be rendered in one place, concerning a thing in another ; the judge of the place where the thing is, ought to execute the judgment by delivering the thing to the successful party, upon receiving written orders to that effect, from the judge by whom such judgment was rendered. And so it would be, where a judge rendered judgment for a debt, against a person, whose property was in another place, than that in which the judgment was rendered. And not only may the judges themselves put valid judgments into execution, but they may cause them to be executed by persons appointed for that purpose, or by the officers of the law, or the alguazil (*a*) of the place where they order it to be done. (1)

LAW 2.

How valid judgments are to be executed.

Judgments which are valid, ought to be executed in the following manner : They who order them to be

(a) Equivalent to sheriff, or constable.

(1) *R. ll. 13. & 15. tit. 21. b. 4.*

executed, ought first to consider, whether the party cast had confessed the debt himself, or whether it had been proved in such manner, that he could not contradict it: then execution may take place immediately, in mild language, without injury to the party cast, by delivering to the successful party, or his heirs, the sum of money, or the specific thing mentioned in the judgment. And if peradventure the party cast, be contumacious and oppose such delivery; then the judge ought to take with him, armed men, and come with them to the place, and put the judgment into execution by force, so that justice may prevail. (1)

LAW 3.

Upon what property the judgment ought to be executed.

A judgment ought to be executed by delivering to the plaintiff, the effects and property of the party cast in the suit; taking in the first place, his moveables to an amount sufficient to satisfy the sum mentioned in the decree: and if his moveables are insufficient, then, as much of his immoveable property as will suffice. And when both are insufficient, the plaintiff may be put into possession of the debts manifestly due the defendant to an amount sufficient to satisfy the judgment. But neither the horses nor arms of military men (*caualleros*), nor their stipends; nor the land given them in lieu of a stipend; nor oxen of the plough of any sort, can be delivered to the plaintiff in virtue of any judgment, whenever any other property of the party, cast can be found to satisfy the same. And if a dispute happen to arise about the property seized in

(1) *R. ll 3 & 18. tit. 7. & ll. 2, 3 & 4. tit. 21. d. 4.*

execution, and any one pretends that it is his, or that he has some right to it, and that it does not belong to the party against whom the judgment was rendered : then the judge shall summarily enquire into the truth of what he alleges ; and if he find it to be so, he ought to leave the property seized, and satisfy the judgment out of other effects of the party cast, concerning which there is no dispute. And what we have above said in this law, holds with respect to judgments rendered for debt, or for something which the party cast was bound to perform. But when the judgment is rendered for a specific thing, whether moveable or immoveable, which the party claimed ; then it ought to be executed upon the thing itself of whatever nature it may be. (1)

LAW 4.

How a judgment rendered against several persons for the same thing, ought to be executed.

A judgement is sometimes rendered against several persons, for something they were bound to give or to do ; condemning them to pay or to do such thing. We therefore say, that if the judge who rendered the judgment, expressly condemned each of them for the whole ; then the judgment may be satisfied out of the property of either of them. But if each of them had not been clearly condemned for the whole ; then we say, it ought to be satisfied out of the property of all of them generally, each one paying his part : for in that case neither of them can be compelled to pay the whole, notwithstanding each of them had bound them-

(1) *R. l. 19. tit. 21. b. 4—ib. l. 3. tit. 2, b. 6.*

selves therefor *in solido*, at the time they had contracted the obligation as securities or debtors. (2)

LAW 5.

Within what time a judgment rendered against any one ought to be executed.

When a judgment is valid, so that it can be carried into execution, either because no appeal had been taken from it ; or if any had been taken, because it had been confirmed, and no further appeal could be had : if the judgment were rendered for a debt acknowledged by the defendant, or for which he had been condemned by the judge ; it ought to be satisfied out of his estate, within ten days. But if it were rendered for a specific thing claimed by the plaintiff, it should be immediately satisfied upon the thing itself for which it had been rendered. And if the party cast allege that he can not forthwith deliver the thing, because it was in another place ; if such allegation be not maliciously made, he ought to give good security, to produce it, at any time which shall be fixed, at the discretion of the judge ; or to pay its appraised value, if he did not produce it. And if judgment be rendered against the defendant for any thing which he was bound to perform ; he ought to be compelled to perform it, accordingly as he had promised or agreed. And if it be rendered in a matter of a criminal nature, where the accused is condemned to suffer death or loss of limb ; it ought to be immediately carried into execution, publicly in the day time, before every one,

(1) *R. ll. 3 & 9. tit. 17. b. 4—ib. l. 1. tit. 16. b. 5.*

and not secretly in the night. For punishment should not only be inflicted upon men who commit crimes, but in such a way as to inspire fear among those who are witnesses of it, that they may not expose themselves to similar chastisement. (1)

LAW 6.

How property taken by seizure, or in virtue of a judgment, ought to be sold.

When a man is put into possession of the property of his debtor, in virtue of a judgment of court; if the debtor does not then pay the debt, the creditor may, under the authorisation of the judge, expose it to sale at auction, during twenty days; after the expiration of which, he may sell it to the highest bidder. And if it bring more than the amount of the debt, he must deliver the overplus to the owner of the thing: if less, then the judge ought to make up the deficiency, by putting the creditor into possession of other property of the party cast. And if during the above mentioned twenty days, no one presents himself to purchase the property, whether through fear or affection for the debtor, or for any other cause; then the judge shall deliver it to the creditor, by way of sale, for as much as he shall conceive it to be worth. (a) (1)

(a) Notwithstanding the mode of satisfying judgments has been very much changed by the legislature of this state, yet most of the provisions contained in the Laws of this title, are still observed.

(1) *R. ll. 7. & 8. tit. 1. b. 3.—ibid. l. 2. tit. 16. b. 5. ibid. l. 13. tit. 1. b. 9.*

(2) *R. l. 6. tit. 8. b. 2.—ibid. l. 43. tit. 4. b. 3.—ibid. l. 43. tit. 13. b. 8.*

TITLES,

Of the Roman Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, which treats of the manner of acquiring property.

Digest, lib. 1 tit. 8. - - - - - *De divisione rerum et qualitate.*

Digest, lib. 49. tit. 1 - - - - - *De acquirendo rerum dominio.*

Institutes, lib. 2. tit. 1. - - - - - *De rerum divisione et acquirendo ipsarum dominio.*

Code, lib. 4. tit. 41. - - - - - *Per quas personas nobis acquiratur.*

Demat's Civil Law, vol. 1. part. 1. preliminary book, tit. 3. sect. 1.

Civil Code, book 2. tit. 1. chap. 1. p. 94.

Things of which one may acquire the property, and how it is acquired.

What is meant by dominion, and how many kinds there are, - - - - - LAW 1

That there is a distinction between the things of this world ; that some of them belong to all creatures living, and others not, - - - - - 2

What are the things which belong in common, to all creatures living, - - - - - 3

What are the things a man may do upon the sea shore, - - - - - 4

That he who finds gold, pearls, or precious stones upon the sea shore, acquires the property of them, - - - - - 5

That every one may use ports, rivers and public roads, - - - - - 6

That trees growing on the banks of rivers, belong to the owners of the adjacent estate, in front of them, - - - - - 7

- That no one has a right to build a mill, or other
edifice on a river, by which the navigation of
vessels, may be obstructed, - - - - - LAW 8
- What are the things that properly belong to the
commons of cities and towns, and which every
one may use, - - - - - 9
- What are the things common to cities and towns,
which each one has not the right to use, - - - 10
- What things belong properly to the king or emperor, 11
- That no one can have the dominion or property of
sacred things, - - - - - 12
- What things are sacred, and how they may be
alienated, - - - - - 13
- That the place where a man is buried, is sacred,
whether he was a freeman or a slave, - - - - 14
- Why the walls and gates of cities, are called sacred
things, - - - - - 15
- That Romulus peopled Rome, and prohibited any
person from entering, either over or under the
walls of the city, - - - - - 16
- That the property in wild beasts or fish, is acquired,
as soon as they are caught, - - - - - 17
- For what causes a man may enter upon the estate
of another, - - - - - 18
- How a man loses the dominion or property he has
in birds and wild beasts, - - - - - 19
- That a man acquires a property in the things he
takes from the enemies of the faith, - - - - 20
- To whom belongs the game, which has been wound-
ed by a person, and taken by another, - - - - 21
- How a man acquires dominion or property in bees,
their swarms, or their honeycombs, - - - - 22
- How a man loses the dominion or property of pea-
cocks, pheasants, and other wild birds, - - - 23
- That a man does not lose the dominion or property
in hens and capons, - - - - - 24

Of cows, ewes, mares, and she asses, - - - - -	LAW 25
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TITLE XXVIII.

Things of which one may acquire the property, and how it is acquired. (b)

LAW 1.

What is meant by dominion, and how many kinds there are.

Dominion, (*sonorie*,) is the power which one has over the things that belong to him; to do with them as he thinks fit, according to the laws of God and man. There are three kinds of dominion. The first is the absolute power enjoyed by kings and emperors, to punish malefactors, and to do justice to every one in the kingdom. Of this we have spoken sufficiently at large in the second, and in many laws of the fourth partida, in this book. The second, is the power which a man has during his life, over the moveable and immoveable things of this world; and which passes at his death, to his heirs, or to those to whom he transfers it, while living. The third is the right which a man has to the fruits and revenues of a thing, during his life, or for a certain time; or which he has to a castle, or a land which he holds by feudal tennure, as is said in the laws of this code, which speak of that matter. (1)

(b) *Dominium est potestas faciendi quod quis vult de suis rebus, ut jus permittit. Et est triplex dominium: unum præeminens, quod princeps habet in coercendis malefactoribus, et in redditione justitiæ cuilibet. Secundum, quod quilibet homo habet in re sua. Tertium quod, habet in fructibus, et redditibus alicujus rei ad vitam, vel ad tempus certum, vel in castro, aut feudali terra. Hoc dicit.* Greg Lopez.

(1) *R. l. 1 tit. 2. b. 2—ibid l. 1. tit. 1. b. 4—ibid. see the Laws of the titles 4. & 6. b. 5. ibid l. 1. tit. 5. b. 7—C. art. 34. p. 100. & art. 1. p. 102.*

LAW 2.

That there is a distinction between the things of this world: that some of them belong to all creatures living, and others not.

There exists a great distinction between the things of this world. For some of them appertain to birds and beasts and all other living creatures, which use them in common with man. There are others which appertain to men only; others to the commons of towns and cities, or to castles or other places inhabited by men. There are others which belong to individuals particularly, and of which they may acquire or lose the dominion or property. And there are others the dominion of which appertains to no one, nor are reckoned among his property, as we shall hereafter shew. (1)

LAW 3.

What are the things which belong in common to all creatures living.

The things which belong in common, to all the living creatures of this world, are, the air, rain, water, the sea and its shores; for every living creature may use them, according to their wants. And therefore every man may enjoy the use of the sea and its shores, either for the purpose of fishing, or navigation; or doing there whatever else he may conceive advantageous to him. Nevertheless, if there be a house on the sea shore, belonging to any one; it ought not to be pulled down, or used, in any manner, without the consent of the builder or owner. If, however, it be de-

(1) C. art. 2. p. 94.

stroyed by the sea, or otherwise; or fall to ruin; then any person may build another in its place. (1)

LAW 4.

What are the things a man may do, upon the sea shore,

Every man who chooses, may build a house or cabin upon the sea shore, as a retreat; and he may erect there, any other edifice whatever, to serve his purposes; provided he does not thereby interfere with the use of the shore, which every one has a right in common to enjoy. He may also build gallies there, or any other vessel whatever; or stretch and mend his nets: and when he is there, or employed for these or other purposes of a similar nature, no one has a right to disturb him. And by the sea shore is understood, all that space of ground covered by the waters of the sea, in their highest annual swells, whether in winter or summer. (2)

LAW 5.

That he who finds gold, pearls, or precious stones on the sea shore, acquires the property of them.

Gold, pearl, and precious stones are sometimes found in the sand of the sea shore. We therefore say, that every one who finds, and first takes possession of these things, becomes the owner of them. For as things found in such places, belong to no one, it is proper and just that they should belong to the first

(1) C. art. 3 & 5. p. 94.

(2) C. art. 4. & 5. p. 94.

finder, who may take them away, and no body can oppose or hinder him. (1)

LAW 6.

That every one may make use of ports, rivers and public roads,

Rivers, ports and public roads, belong to all men in common; so that strangers coming from foreign countries, may make use of them, in the same manner, as the inhabitants of the place where they are. And though the dominion or property, (*senorio*) of the banks of rivers belongs to the owner of the adjoining estate; nevertheless, every man may make use of them, to fasten his vessel to the trees that grow there; or to refit his vessel; or to put his sails or merchandise there. So fishermen may put and expose their fish for sale there, and dry their nets; or make use of the banks for all other like purposes, which appertain to the art or trade, by which they live. (2)

LAW 7.

That trees growing on the banks of rivers, belong to the owners of the adjacent estate in front of them.

All the trees growing on the banks of rivers, belong to the owners of the adjoining estate, who may cut, or cause them to be cut down, or do with them whatever they think fit. Yet, if at the time they are about to cut them down, they find any vessel fastened, or about to be fastened to such trees; they can not im-

(1) *R. l. 1. tit. 13. b. 6.—C. art. 9. p. 474.*

(2) *R. see the Laws of the title 8. b. 4—ibid. l. 1. title 19. b. 6.—ibid l. 5. tit. 26. B. 8.—C. art, 7 & 8. p. 94. & .96,*

mediately cut them down; otherwise they would interfere with the right, which every man has to use the banks of rivers, as is above said. But if there is no vessel fastened, nor about to be fastened to such trees by any one; then they may be cut down and converted to the owner's use.

LAW 8.

That no one has a right to build a mill or other edifice on a river, by which the navigation of vessels may be obstructed.

No man has a right to dig a new canal, construct a new mill, house, tower, cabin or any other building whatever, in rivers which are navigated by vessels; nor upon their banks, by which the common use of them, may be obstructed. And if he does, whether the canal or edifice be newly or anciently made; if it interfere with such common use, it ought to be destroyed. For it is not just that the common good of all men generally, should be sacrificed to the interest of some persons only. (1)

LAW 9.

What are the things that properly belong to the commons of cities and towns, and which every one may use (a)

The things which belong separately to the commons of cities or towns, are the water fountains, the places

(1) *R. l. 9. tit. 11. b. 6.—Ibid. l. 2. tit. 10. b. 7.*

(a) *Communia universitatis sunt fontes, plateæ, ubi feriæ fiunt, concilia, viæ, montes, & campi theatra, stadia, et similia, quibus quilibet de universitate potest uti. Hoc dicit.*

where fairs and markets are held, or where the city councils meet; the sandy places on the banks of rivers; the thrashing (*exidos*) and race grounds; the forests and pastures, and all other similar places which have been appropriated and granted for the common use of each city, town, castle, or other place. For every person living there, may use these things, they being common alike to every man, to the poor as well as to the rich. But they who reside in other places, can not use them, against the consent or prohibition of those who live there. (1)

LAW 10

What are the things common to cities and towns, which each one has not the right to use.

Cities and towns may possess vineyards, gardens, olive fields and other estates; or cattle, or slaves, or other things which produce fruits or revenue. And though they belong in common to all the inhabitants, nevertheless, each one cannot make a particular use of them. But the fruits and revenues they produce, ought to be applied to the common good of the city, or town to which they belong: as for the repairs of the walls, bridges, fortifications, or the maintenance of cattle; or to pay the judges who preside at the gates (*aportellados*); or for other like purposes which appertain to the common good of the whole city or town. (2)

(1) *R. see the laws of the title 19. b. 6.—ibid. l. 1. tit. 5. b. 7. —C. art. 7 & 9. p. 94 & 96.*

(2) *R. l. 1. tit. 5. b. 7. and see the laws of the title 7. b. 7. and of the title 19. b. 6. c. art. 9. p. 96.*

LAW 11.

What things belong properly to the king or emperor.

The revenues of ports and the duties paid by merchants on the goods they import into, or export out of the kingdom; the rents of salines, of fisheries, of forges of iron, and other metals; and the tribute paid by individuals, belong to the emperors and kings; and are granted to them that they may have wherewith to maintain themselves with dignity, to defend the kingdom and make war upon the enemies of the faith; and moreover to enable them to relieve the people from the burthen of heavy taxes and other grievances, (1)

LAW 12.

That no one can have the dominion or property of sacred things.

(Not in force)

LAW 13.

What things are sacred, and how they may be alienated.

(Not in force.)

LAW 14.

That the place where a man is buried is sacred, whether he were a free man or a slave.

(Not in force.)

LAW 15.

Why the walls and gates of cities are called sacred things

(Not in force.)

(1) R. see the laws of the tit. 10. b. 5.—Ibid. l. 15. tit. 27. b. 9. c. art. 38. p. 100.

LAW 16.

That Romulus peopled Rome and prohibited any person from entering either over or under the walls of the city.

(Not in force.)

LAW 17.

That the property in wild beasts or fish, is acquired as soon as they are caught.

Wild beasts, and birds, the fish of the sea and rivers, become the property of him who catches them, as soon as they are in his possession, whether he took them on his own, or on another's estate. Yet when any one is about to enter upon the estate of another to hunt, and finds the owner there, who forbids him to enter for that purpose; if he nevertheless enters and catches game; it will not belong to the hunter, but to the owner of the estate. For no man has a right to enter upon the lands of another, to hunt, or for any other purpose, when he is forbidden by the owner. And so it would be, if the owner had found him already hunting upon his estate, and forbid him to hunt there any more: for all the game he might afterwards take, would belong to the owner and not to him. But if before he had been thus forbidden by the owner, he had taken any game, it would belong to him, and the owner would have no claim whatever to it. (1)

(1) *C. art. 4. p. 474.*

LAW 18.

For what causes a man may enter upon the estate of another

A man may enter upon the estate of another against the wish (*defendimiento*) of the owner, for any of the reasons mentioned in this law. The first is where one has fruit trees which extend their branches over another man's ground, and the fruit falls there; then the owner of the tree, may enter to gather his fruit, at any time within three days, but not afterwards. The second is where one has hid money in another man's land, and he swears that he did not do it with any evil intention; the owner of the land ought to permit him to enter and take away his money, without any hinderance whatever. The third is, where a man had bought the grapes of a vineyard; or the fruits of the trees of a garden or other estate, and had paid the price of them: he may then enter to gather the fruits he had bought, and the owner of the estate can not prevent him, though he should wish to do so.

LAW 19.

How a man loses the dominion or property he has in birds and wild beasts.

A man loses the dominion or property he had acquired in birds, wild beasts, and fish, in the manner mentioned in the third preceding law, immediately they escape from his power and return to the state in which they were before taken: or when they go off so far as not to be seen; or if seen, are so far off, as not to be retaken without difficulty. In either of

these cases, they will become the property of him who first takes them. (1)

LAW 20.

That a man acquires a property in the things he takes from the enemies of the faith.

(Not in force)

LAW 21.

To whom game belongs which had been wounded by one person, and taken by another.

While a hunter is in pursuit of the game he has wounded, it is sometimes overtaken and seized by another person. And as they may dispute which of them ought to have it, we say, it ought to belong to the person who had first taken it; for though the hunter had wounded it, yet it was not in his power, and many causes might have prevented him from getting possession of it. And so we say it would be, that where any one had stretched a net, or laid a snare, or dug a ditch, or placed a pit-fall in which game had fallen: it would belong to the person who first came and found or took it. This would be conformable to justice, though a contrary custom prevails in some places.

LAW 22.

How a man acquires dominion or property in bees, their swarms or their honeycomb.

Bees are considered as naturally wild. We therefore say, that though a swarm of them, light upon a tree belonging to any person, yet he cannot say they are

(1 C. art. 5. p. 474.

his own, until he has confined them in a hive, or other thing. And so it would be with birds that light there; he could not claim them, until he had caught them. And so we say it would be with the honeycomb which bees make upon a tree belonging to any person, it would not, on that account, belong to him, until he had taken possession of it, and conveyed it away. For if any other person come first, and take it away, it will belong to him; unless the owner of the tree were present when he came and forbade him. We also say, that if a swarm of bees fly away from a man's hive, so that he lose sight of them; or if they go to so great a distance, that he can neither retake nor follow them; he will then lose his property in them and they will belong to the first person who takes and confines them.

LAW 23.

How a man loses the dominion or property in peacocks, pheasants and other wild birds.

Men sometimes tame and rear about their houses, peacocks, sparrow hawks, hens, pigeons, crows, geese, and pheasants, and other birds wild by nature, wherefore we say, that the person who reared them will retain his property in them, wherever they may go, as long as they are accustomed to go and return to his house: but as soon as they lose the habit of going and returning, he will lose the property in them, and it will be acquired by the first person who takes them. And so we say of stags and does, of zebras and other wild beasts which men had reared about their houses: for immediately they return to the woods, and cease to

come to the house or place where they were kept by their owner, he will lose the property in them. (1)

LAW 24.

That a man does not lose the dominion or property in hens and capons.

Hens, capons, and geese, which are hatched and reared about a man's house, are not wild in their nature. Wherefore we say, that though they fly and wander away from the houses of those who reared them, through fear or otherwise, and do not return; nevertheless the owner does not lose his property in them: but he may, on the contrary, claim them by action of theft of any person who takes them, with an intention of depriving him of them, in the same manner he could any thing else stolen from his house. (2)

LAW 25. 1

Of cows, ewes, mares, and she asses.

We say that the young of cows, ewes, mares, and she asses, and other beasts or flocks of a similar kind that give an increase, belong to the owners of the females that produced them: And the owners of the males that begot them, have no claim whatever to them. Unless a contrary custom prevailed in the place; or some agreement, or contract, had been entered into between the owners of the male and female, before they had connexion together; for in that case the agreement ought to be observed. (3)

(1) *C. art. 6. p. 474.*

(2) *C. ort. 8. p. 474.*

(3) *R. l. 2. tit. 16. b. 5. — C. art. 24. p. 40.*

LAW 26.

To whom belongs the increase which a river makes to an estate.

Rivers sometimes swell to such a height, that they carry away a portion of one estate, and join it to another, situated elsewhere, on their banks. Wherefore we say, that the earth which a river carries away from an estate, little by little, and imperceptibly, because not all in a body, becomes the property of him to whose estate it is carried, and he who lost it, has no claim whatever to it. But if the river carries away a part of an estate all at once in a body, whether with or without its trees; the earth so carried away, will not become the property of him to whose estate it is joined; unless a sufficient time had elapsed for the trees to take root there: for then this new portion of earth, becomes the property of the owner of the lands where the trees thus take root; but in that case, he will be obliged to pay the former proprietor, the damage he had sustained, according to the estimation of good men, skilled in cultivating lands, (1)

LAW 27.

How islands formed by rivers are to be divided.

Islands sometimes rise in rivers, and men dispute about the right of property in them. We therefore say, that if the island rise in the middle of the river, the owners of the estates, on the opposite banks, ought to divide it in the middle, each one taking as much of that half towards his estate, as equals the extent of his

(1) C, art 13 & 15. p. 106.

lands upon the bank. But if it rise entirely in one half of the river, towards one side ; it ought to be divided as is above said, by the owners of the adjacent lands on that side. But if it does not rise entirely in one half of the river and towards one of its shores, nor in the middle, but so that the greatest part of it be rather on one side than the other ; then a cord must be taken and measured out, as long as the river is wide ; and after having measured it, of the same length with the width of the river, so that it be neither more nor less, it must be doubled, and the place marked on the island to which the half of the cord extends : from that point a division must be made, between the proprietors of the adjacent banks, agreeably to what is above said, each taking a portion of the island, according to the extent of his estate opposit thereto.

LAW 28.

If a river form an island within the estate of any one, he does not lose his property in it.

Rivers are sometimes so swelled by the increase of waters, that they enter upon peoples's estates, traverse them, and form islands there. And, notwithstanding we prescribed in the preceeding law, the manner in which islands formed in rivers are to be divided ; yet it is not to be understood that those formed in the way here spoken of, are to be so divided : for with respect to these, no one can have any right to them, except the owner of the estate within which they are formed : he preserving the dominion or property which he before had in his estate, unimpaired by such event. (1)

(1) *C. art. 16. p. 106.*

LAW 29.

To whom the islands belong, that are newly formed in the sea.

It seldom happens that islands are newly formed in the sea. Yet if one should be so formed, we say it will belong to the first occupant: and he or they who first occupy it, will owe obedience to the sovereign, within whose dominion it is formed.

LAW 30.

To whom the island belongs, that is formed in front of an estate which is held by a tenant or usufructuary.

A man may have the usufruct for life, of an estate situated on the bank of a river; or he may hold it by feudal tenure. And though we have said in the fourth preceding law, that islands which are formed in rivers, ought to be divided between the owners of the lands, on the opposite banks, in the manner we have therein prescribed; yet they who have the usufruct of such lands, or hold them by feudal tenure, can have no claim whatever to these islands; but they will respectively belong, as well as the usufruct of them, to the owners of the adjoining estates. Yet if an estate of which one has the usufruct, or which he holds by feudal tenure, is increased by the alluvion of the river; the usufruct of what is thus added, will belong to him, in the same manner as the usufruct of the estate itself, to which it was added.

LAW 31.

When a river changes its course, to whom will belong the bed where it formerly run.

Rivers sometimes take new courses, abandoning

their former beds and leaving them dry. And as disputes may arise about the right of property to the ground thus left; we say it will belong to the owners of the adjoining lands, in proportion to the extent of their estates upon the banks. And the owners of the lands through which the river makes its new bed, will lose the property in the soil it covers, which will now be of the same nature of the former bed, and will like the river itself vest in the public, (1)

LAW 32.

That one does not lose the property in his estate, though covered with water.

Lands are sometimes covered with water, by the inundation of rivers, and remain so covered for many days; and though the owner, during that time, loses the possession of them, he nevertheless preserves his right to the property: for as soon as the waters retire to their former channel and leave the lands uncovered, he will enjoy them as before.

LAW 33.

To whom belongs the wine, or oil, which one man makes of another's grapes, or olives.

A man sometimes makes wine, or oil, of another's grapes or olives; or gathers wheat or barley from another's harvest; or makes vases, cups or other vessels, of another's gold or silver; or basins or pitchers, or the like of the brass or copper, or other metal belonging to another person; doing it, in good faith, believing

(1) C. art. 17. p. 106.

such materials to be his own. And as disputes may arise about the right of property to these things, whether they belong to the owner of the materials, or to the maker; we say that if the things so made up, be of such a nature as not to be restored to their former state: such as grapes or olives, after the wine or oil is extracted, or ears of grain, after they are converted into flour; in these and like cases, where the materials can not be restored to their former state, they who make them up into any of the above mentioned things, in good faith, will acquire the right of property therein: though they will be bound to pay the owner of the materials, their estimated value. But if they be of a nature to be restored to their former state; as a vase, or other vessel made of gold, or silver, or other metal that can be melted: in these and similar cases, the right of property in the materials remains in the original owner, and he is not divested of it, by their being converted by another person, into something new. But if the maker of these things, acted in bad faith, knowing that the materials of which he made them, were not his own; he shall lose his work, and the expenses it had cost him. (1)

LAW 34.

Where a man mixes gold, or other metal belonging to another person, with his own, to whom the mixture belongs.

Where a man melts or mixes the gold or silver, or other metal belonging to another person, with his own, without the owner's consent, forming it into a mass or

(1) C. art. 24 & 25. p. 108.

ingot; the property of the metals so mixed, remains always in the original proprietor, whether the person mixing them had acted in bad faith or not; whether he did, or did not know, they belonged to another person. But if two, three, or more persons agree to melt or mix together, gold, silver, or any other metal whatever; the mixture will be common to them all, each one retaining the property in his share of metal so mixed, in proportion to its quality or weight. And so we say it would be, with all other things that can be counted, weighed or measured, which can be formed into one mass, and which men mix or join together by agreement. And so we likewise say it would be, where things are mixed together in a mass, by accident, without the consent of the owners, if they are of such a nature as not to be separated from one another. As where one man's oil or wheat, is mixed with that of another; or any other similar thing whatever, whether they be of the same or different natures, so that they can not be separated from one another, without great labor. But if things mixed by accident, be of such a nature, that they can be separated from one another: as if the gold of one man be mixed with the silver, pewter or lead of another: such, and other similar things which can be separated from one another by melting in the fire, being of unlike natures; we say, they will still remain the property of their respective owners, notwithstanding they are joined, or mixed with those of other persons. (1)

(1) *C. art. 26 & 27. p. 108.*

LAW 35.

When a man puts the foot of another's vase to his own, or other similar thing; who acquires or loses the right of property therein.

Where a man joins, whether in good or bad faith, the foot of another's vase, or the arm or other limb of another's statue, to his own vase or statue, whether of gold or silver; if the solder be of lead, he does not thereby acquire the property in the thing so joined; but it still remains in the original owner. But if the solder be of the same metal with both parts of the vase, and he had joined them together, in good faith, believing that the part he so added, was his own; he would then acquire the property in it. Yet he would be bound to pay its estimated value to the owner. But if he had joined the foot of his own vase, to the vase of another, in bad faith, knowing that the vase belonged to another; he will lose the property he had in the foot of his own vase; whether the solder were of lead or of the same metal of the parts joined together. For since he knew the vase belonged to another person, when he joined the foot of his own to it; we are to presume he intended to give it to the owner of the vase. But if he had joined them together, in good faith, believing that the vase, as well as the foot, belonged to him; then the owner will not acquire the property in the foot added to his vase; but on the contrary, should he choose to retain the foot, he will be bound to pay its value to the owner who had so joined it; and should he not wish to retain it, he ought to

deliver it to its owner; in which case he will not be obliged to pay him its value. (1)

LAW 36.

When a man writes a book upon the parchment of another, to whom the book belongs.

If a man write a book of verses, or of any other kind, upon another's parchment; the book will belong to the owner of the parchment upon which it is written. But if he had written it in good faith, believing that the parchment was his own, or that he had some right to it; if the owner of the parchment choose to retain the book, he shall pay the other, the value of what he had written, according to the estimate of learned men.

But if he had written it in bad faith, knowing that the parchment belonged to another person; he shall lose what he had written, and shall deliver the book to the owner of the parchment, unless he had written it for a stipulated price; for then the owner will be obliged to pay him what he had promised. (2)

LAW 37.

If a man paint a figure upon another's plank, to whom it ought to belong.

If a man paint a figure or other thing upon another's plank or post, in good faith, believing that the materials upon which he painted, belonged to him, and that he had a right to use them: he will then acquire the property in the plank, or other substance upon which he painted, in the same manner as in the figure

(1) C. art. 20. 21. 22. & 23. p. 106.

(2) C. art. 24. & 25. p. 108.

itself; but he will be bound to pay the owner the value of his plank. But if he had acted in bad faith, knowing that the substance upon which he painted, did not belong to him; he will lose the painting he had made, and it will become the property of the owner of the substance upon which it was painted. For it is to be presumed, that, since he knew the plank belonged to another person, he intended to give to him the painting he had made thereon. So we say it would be, where any one had engraved, or cut any thing in the stone or wood of another person; if he did it under the orders of the owners of the materials, the property in what was painted or engraved, will belong to him who ordered it to be executed; and he will be bound to pay the artificer, the price of his labor, (1)

LAW 38.

If a man build an edifice of the stone or wood of another person, to whom it will belong.

If a man, in constructing his house or other fabric, use the stone, brick, pillars, timber or other like materials, belonging to another person: when once they are employed and incorporated in the work, the owner can no longer claim them, and they become the property of him who employed them, whether he acted in good, or bad faith. And this provision of the law was established by the ancient sages, for the benefit of cities and towns, in order to prevent the edifices built there, for their use and ornament, from being, on that account, pulled down and destroyed. But the person who

(1) C. art. 24. & 25, ff. 108.

used such materials, will be obliged to pay double their value to the owner of them. (A) (1)

LAW 39.

To whom belong the fruits of an estate, from which a man had been ejected by a judgment.

A man may buy a house, or an estate of another, in good faith, believing it to be the property of the seller and that he had a right to alienate it: and afterwards the true owner may claim it, and evict him by a judgment. In that case we say, that the fruits of the estate, which he had gathered and consumed previous to issue joined in the cause, will belong to him for the work and labor he had done thereon; and he will not be obliged to restore them to the successful party, though he will the estate itself, as well as the fruits he had not yet consumed; first deducting the expences he had incurred on their account. We likewise say, that if the fruits he had gathered be of a nature that did not arise from the labour of man, but were yielded by the estate itself: as pears, apples, cherries, nuts, or other similar fruits which trees naturally produce, without the labour of man; these he will be obliged to restore with the estate, though he had made use of them in good faith. But if he had bought or had acquired the estate in any other way, in bad faith, knowing it did not belong to him who alienated it; then he will be bound to pay the price of the fruits he had gather-

(A) The translators have conceived that laws 33 to 38 inclusively, were in force, under the modifications expressed in the articles of the civil code, contained in page 108.

(2) C. art. 31. p. 480.

ed therefrom, notwithstanding he had already consumed them, deducting always the expenses he had incurred on their account. (1)

LAW 40.

That he who possesses a thing in bad faith, and is ejected by a judgment, must restore the fruits he had gathered.

There are two ways in which a man may acquire an estate, or other property, in bad faith. The first is where he obtains it by theft or robbery, or enters upon it, without any right whatever. If such a person be evicted by a judgment, he will be obliged to restore the estate together with all the fruits he had gathered from it, as well as those which might have been gathered by the owner himself. The second is where he acquires it by purchase, donation or other just title, knowing, however, that the person from whom he obtained it, had no right to alienate it. If then he be evicted by a judgment, he will be obliged to restore all the fruits he had gathered from the estate, but not those which might have been gathered by the owner, had he retained possession of it; except however in four cases. The first is, where a person had sold his estate to defraud his creditors, the purchaser knowing of the fraud. The second where it had been sold through force or fear. The third where any thing is ordered to be sold by an officer of court, and the purchaser buyes it, without observing the formalities prescribed in such sales. The fourth is, where the estate has been acquired contrary to the laws of this code.

(1) C. art. 31. p. 480.

For whoever acquires an estate in either of these four ways, will be obliged to restore it, with all the fruits he had gathered from it, as well as those which might have been gathered by the proprietor himself. (1)

LAW 41.

That a man ought to recover the expenses he had incurred, on account of an estate which he had bought in good faith, and from which he had been evicted by a judgment of court.

A man may purchase or acquire another's estate, in good faith, and erect new buildings thereon; such as a house, a town or other edifice; or plant trees there or make a vineyard, or do other similar things, as upon his own lands; and the true proprietor may then come and evict him by a judgment of court. And as a question may arise whether the purchaser ought to be reimbursed the expenses such additional labour had cost him, we say that, before the house or estate be delivered to the successful party, he shall pay the other all the expenses he had incurred, on account of the new works he had put there: and it is but just that he should be so paid, since he had acquired the estate in good faith and labored thereon, as upon his own. Yet in as much as he sought to be reimbursed such expenses, it is likewise just that he should account to the owner of the estate, for any rents, fruits or crops he had gathered from it. Nevertheless, if the owner be so poor, that though he were willing to sell all he had, he could not then pay the expenses; in that case, we say,

(1 C. art. 31. p. 480.

he will not be obliged to pay them: but the person to whom they are due, may carry away from the house or estate, the additional works he had put there, and convert them to his own profit. Nevertheless, we think proper, and we do ordain, that if the owner be willing to pay the other, for the objects he was about to remove, the same price he could get for them, after they were carried away; then he shall take the price, and shall not carry them away. And so we say it would be where the purchaser who had made the additional works to the house or estate, acquired it in good faith, but before he had begun to construct the works there, acted in bad faith, knowing that the person from whom he acquired the property, had no right to alienate it: for then, if the true owner evict him by a judgment of court, he can not recover the expenses he had incurred; though he may remove the works themselves he had constructed on the estate, in the manner above mentioned.

LAW 42.

That a man can not recover the expenses he had incurred, on account of a thing which he held in bad faith.

If a man construct an edifice, or sow seed in bad faith, upon another's lands, knowing he had no right to do it; and he be afterwards evicted by the owner; he will lose what he had so built or sowed; they will belong to the owner, and he can not recover the expenses he had incurred on their account. But when he delivers the fruits produced by the estate, or their es-

estimated value to the owner, he may deduct therefrom the expenses they had cost him. (1)

LAW 43.

What penalty a man incurs, who in bad faith, plants trees, or vines upon another's lands.

Where a man knowingly, in bad faith, plants trees or makes a vineyard upon another's lands ; he will lose the property in them immediately they take root, or are nourished from the ground. And so we say it would be if he had planted another man's trees, or made a vineyard from the branches of another man's vines, upon his own lands : that he will acquire the property in them immediately they take root, whether he planted them in good or bad faith ; though he will be bound to pay their estimated value to the person to whom they belonged. We likewise say, that if a man plant a tree on his own estate, and it afterwards extend the principal roots by which it is nourished into the lands of an adjoining proprietor ; the tree will become the property of the latter, notwithstanding it extended its branches over the estate of him who planted it. But if a part of the principal roots of the tree were in the lands of him who planted it, and a part in the neighbouring lands, then the property of the tree will be common to the proprietors of both estates.

LAW 44.

What are, and what are not the expenses a man may recover for the repairs he had made to another's house or estate.

Men may incur expenses, on account of other persons houses or lands, not by erecting new works there,

(1) C. art. 12. p. 104.

but by making necessary repairs, or doing other things there, by which the estate is benefited. In that case we say, that if such expenses were necessary, they who incurred them, may and ought to recover them back while in possession of the estate upon which they expended them, whether they held in good or bad faith: and though the owner may evict them by a judgment of court, they will not be obliged to deliver him the house or estate, until he shall have paid the expenses incurred on account of the same. Yet if the party cast had gathered any fruits or rents from the house or estate, he ought to deduct their value from such expenses: for it is but just that since he sought to be reimbursed the latter, he should render an account of the revenues. We likewise say, that if a man incur expenses for the advantage of another's estate or house, while he held it, acting in good faith, believing the property to be his own, he may recover the amount, whether they were necessary or not: but if he acted in bad faith, knowing that the estate or house belonged to another person, and the owner who evicted him, be unwilling to reimburse him, he may then carry away the additional works he had put there. We likewise say, that if a man who holds another's house or estate, incurs, on their account, expenses which are not very useful but rather ornamental: such as for paintings or water spouts, or other works, intended more for pleasure, than utility: if he held the estate or house in good faith, believing them to be his own; then he may carry away the additional works he had put there. Nevertheless, if the owner be willing to pay him what would be their value, after they were

taken away; then he should leave them with the owner. But if the party incurring such expenses held the house or estate in bad faith; he will lose what he had expended, nor can he carry away the additional works he had put there.

LAW 45.

To whom belongs the treasure, which a man finds in his own, or on another's estate.

A man sometimes finds a treasure in his house or lands, by chance, or by searching for them. And as doubts may arise to whom it belongs, we say, that if it be of such a nature, that no one can know who put it there, or whose it is; it will belong entirely to the person who found it in his house or lands—But if, peradventure, any one had hid it there, or could prove that it belonged to him; then it will not become the property of him who found it on his estate. But if a man happen to find a treasure in another's house or on his estate, whether by laboring there or otherwise; provided he found it by chance, and not by express search: then one half will belong to him, and the other half to the owner of the house or estate where he found it. But if he had found it by expressly searching for it, and not by chance: then the whole will belong to the proprietor of the estate, and no part whatever to the finder. And so we say it would be, if the treasure had been found in a house belonging to the king, or the commons of a city or town. (1)

(1) *R. ll. 1. 2. 3. & 4. tit. 3. b. 6.—C. art. 11. 476.*

LAW 46.

That the property in the thing sold, does not pass to him to whom it is delivered, until he has paid the price.

Men sometimes deliver their property into the possession of other persons, by selling it to them, or by giving it in dowry, or otherwise ; or by exchange, or under any other just title. Wherefore, we say, that by such delivery which a man makes himself, or which another makes by his order, the property in the thing, passes to the person to whom it is delivered. Nevertheless, if a man deliver a thing into the possession of one to whom he had sold it, and the buyer had not paid the price, nor given any security, or pledge, nor stipulated any term for the payment of it: the property in the thing sold, will not pass to the buyer, until he had paid the price thereof. But if he had given any security or pledge for the payment of the price, or had stipulated a term therefor: or if the seller had trusted to him for the payment of it: then the property in the thing will pass by delivery, notwithstanding the price had not been paid, and the purchaser will remain bound to pay it thereafter. (1)

LAW 47.

That a man acquires the property in a thing which he had hired, if he afterwards buy it of the person who let it.

If a man hire any thing belonging to himself, to another person, or lend it to him, or put it in his keeping, and afterwards gives or sells it to him ; though the thing be not in view of the parties at the time, nor any de-

(1) C. art. 75. n. 1. p. 470.

livery of it be made; nevertheless, the person to whom it is given or sold, will acquire the property therein. We likewise say, that by whatever ways or means the possession of a thing, can pass from one man to another, though no corporeal delivery thereof be made, according to what was said in the title which spoke of the manner in which one may acquire the possession of things: that by the same ways and means the property of a thing will pass to him to whom it is sold, or exchanged, or given in dowry, or otherwise; or who acquires it by any other just title, though no corporeal delivery were made of the thing itself. We likewise say, that where men enter into a partnership among themselves, stipulating, that all they possess, or shall thereafter acquire, shall belong in common to each partner: that so soon as the partnership is formed, or signed, or agreed upon, between the parties, the property of every thing each of them owns, shall pass to the others in the same manner, as if each had made a corporeal delivery of all he had to the others. Nevertheless, if a debt be due to either of the partners, or he be possessed of any other right whatever, previous to forming the partnership; the other partners can not claim or demand it, unless by his order; though he will be obliged to give them power to that effect, and what they derive thereby, will be in common to them all. We also say that the property of every thing that is gained by any of the partners, will vest in the others in the same manner as if acquired by themselves. (1)

(1) *C. art. 27. p. 350.*

LAW 48.

That the property is acquired in things which are thrown by kings or emperors in the streets, when they are crowned or knighted.

(Not in force.)

LAW 49.

When a man abandons any thing belonging to him, it will become the property of the person, who first takes possession of it.

Men are sometimes dissatisfied with a thing they possess, and abandon or throw it away, so that it becomes the property of whoever wishes it. Wherefore we say, that when a man abandons a moveable thing, with an intention that it shall no longer be his; it will then become the property of him who first takes possession of it and carries it away; unless it be an infirm or wounded slave, who had been abandoned: for he would become free, so soon as he was deserted by his master; and though another person were to carry him away and dress and cure his wounds, he would not, on that account, acquire any right over the slave. And so we say, that men do not lose their property in the things which they throw in the sea, through fear of a tempest, as is said in the laws of the fifth Partida, which treats of that matter. (1)

(1) *C. art. 10 & 13. p. 476.*

LAW 50.

When a man abandons an immoveable thing belonging to him, the first person who takes possession of it, will acquire the property therein.

If a man be dissatisfied with his immoveable estate and abandon it; immediately he departs from it corporeally, with an intention that it shall no longer be his; it will become the property of him who first enters thereon. But if he does not leave it, though he were to declare that he did not wish any longer to retain it; yet as long as he remains there, no person can enter; and if any one were to enter, he would not acquire the property thereof, until the owner had personally departed from it, and ceased to have possession of it. We likewise say, that if any one abandon his estate and does not enter upon it, through fear of enemies or robbers; no one else can take possession of it; and if he does, he would not acquire the property thereof. For although the owner had not corporeal possession of his estate, he would nevertheless retain the property of it, in his mind, and therefore no other person ought, or can enter upon it.

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on prescriptions.

Digest, lib. 41 tit. 3. - - - - *De usurpationibus et usucapionibus.*

Institutes, lib. 2. tit. 6. - - *De usurpationibus et longi tem-
poris prescriptionibus.* (a)

Domat's Civil Law, vol. 1. part. 1. book, 3. tit. 7.

Fuero Juzgo, Book 10. tit. 2.

Fuero Viejo, Book 4. tit. 4.

Fuero Real, Book 2. tit. 11.

Leyes del Estilo. ll. 192. 221. 24.

Ordenamiento de Alcala, tit. 9.

Ordenamiento Real, Book 3. tit. 13.

Recopilacion de Castilla, Book 4. tit. 15.

Civil Code, Book 3. tit. 20. p. 472.

OF PRESCRIPTION.

What reason induced the ancient Sages to declare that men should lose their property in things by the effect of time, - - - - -	LAW 1
Who can acquire another person's property by prescription, - - - - -	2
That slaves can not acquire by prescription the property of another person, - - - - -	3
What things are called moveable, and how they are acquired by prescription, - - - - -	4
When the buyer can acquire the young of a Female slave, or mare, or cow, or other like thing which had been obtained by violence, theft or robbery and sold to him, - - - - -	5
That neither a thing sacred nor a free man can be acquired by prescription, - - - - -	6
That the public places, nor roads, nor pastures, or thrashing ground, nor other like places which belong in common to the people, can not be lost by prescription, - - - - -	7

(a) See the Digest Book. 41. tit. 4. 5. 6. 7. 8. 9. & 10.—and the
Code Book. 7. tit. 21. 22. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35.
36. 37. 38. 39. & 40.

- That a minor under twenty five years of age, or
a son under the power of his father, or a mar-
ried woman, do not lose ther property by pre-
scription, - - - - - , - - LAW 8
- In what time moveable things may be acquired by
prescription, and what is necessary in that res-
pect, - - - - - 9
- That the purchaser does not hold a thing in good
faith, which he is warned not to buy, by the
owner who claims it, - - - - - 10
- That he who buys the estate of an orphan, or a
madman, or of the attorney of any one, by
wickedly corrupting him, can not acquire it
by prescription, - - - - - 11
- That he who buys or receives a thing in exchange
ought to act in good faith, - - - - - 12
- Whether, or not the master can acquire by pre-
scription a thing belonging to a third person,
which his slave had bought with his peculium or
by his master's command, - - - - - 13
- That a man may acquire the property of another
person, believing he possessed it, by a just title;
though it were otherwise, - - - - - 14
- That a man may acquire by prescription, a legacy,
or payment, delivered or made to him, under
the belief that it was due, - - - - - 15
- That a man may add the time during which he
possessed a thing to the time it was held by the
person from whom he obtained it, - - - - - 16
- That one who holds a thing in pledge, does not
lose his right, though another should acquire it
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- In how long a time things immoveable and incor-
poreal, are acquired by prescription, - - - - - 18
- If he who sold the thing, knew that he had not a
right to alienate it, the person who received it,

- could not acquire it by prescription, in less than
thirty years, - - - - - LAW 19
- How the time for prescription, ought to be count-
ed, when either the possessor or owner of the
thing, absents himself from the country, - - - 20
- That any thing, whatever be its nature, may be
acquired by a prescription of thirty years,
whether held in good or bad faith, - - - - - 21
- That a man may, by thirty years prescription,
lose the debts that are due him ; though he will
not, in that time, lose the things he had hired
out, - - - - - 22
- In what time a slave regains his freedom, - - - 23
- That a free man can not be reduced to slavery by
prescription, - - - - - , - - - 24
- If a slave pass for a free man at the time of his
death, a suit may be instituted against his chil-
dren, within five years from that period but not
afterwards, - - - - - 25
- In what time the church may lose its property
by prescription, - - - - - 26
- That the pawnee may lose, by prescription, his
right to the thing pledged, - - - - - 27
- Who they are that do not lose their property by
prescription, in their absence, - - - - - 28
- How the prescription by which a man has begun
to acquire a thing, is interrupted or destroyed, 29
- When the possessor of a thing departs from the
country, or dies, leaving a child under seven
years of age, or when he is a man of great
rank and power ; what the owner of the thing
ought to do in that case, to prevent its loss by
prescription, - - - - - 30

TITLE XXIX.

Of time or prescription, by which things whether moveable or immoveable may be lost. (1)

LAW 1.

What reasons induced the ancient sages to ordain that men should lose their property in things, by the effect of time.

The ancient sages were induced to ordain that things should be acquired, or lost, by the effect of time, in order that every man might be certain of his property in them: for if it were not so, some would neglect and forget their estates, and other persons would enter upon them and claim them as their own right: whence suits and contentions would arise, so that no man would be certain of his own. Wherefore, in order to avoid the expenses and losses such suits and contentions might cause, and that the property in things might be rendered secure; it has been thought expedient to fix a certain time, in which each particular thing might be gained or lost, wherever their owners had neglected to claim them, when they had it in their power to have done so. (2)

(1) *R. see the laws of the title 15. b. 4. C. b. 3. tit. 20. ch. 3.*

(2) *R. l. 6. tit. 15. b. 4.—C. art. 32. p. 482.*

LAW 2.

*Who can acquire another person's property by prescription,
(tiempo.) (a)*

Any man of sound mind, though a minor, may acquire a thing by prescription. But a madman, or an idiot can neither begin to acquire or lose by that means, from the moment he is deprived of his reason: because he has not the necessary desire or understanding for either, notwithstanding he be in possession of the thing. Nevertheless, if before he had lost his reason, he, or the person whose estate he inherited, had began to acquire a thing by prescription; he may then acquire it, as well after he is deprived of his reason as before. (1)

LAW 3.

*That slaves can not acquire by prescription the things of
another person.*

A slave can not acquire by prescription, the things of another person. And this, because it would not be consistent that he should have a property in other things, when he had none in himself. Nevertheless, if a slave keep a shop for his master; or were an artificer in any trade, or had funds, or a *peculium* with which he traded or bartered, or used as an artificer: if by any such means he began to possess any thing by a just title, his master may, through him, acquire

(a) *Prescripton* has been chosen as the best translation of this word, when used in a legal sense.

(1) *R. ll. 3. & b. tit. 15. b. 4.*

it, by prescription; because the master is possessor and owner of the slave, and the property or *peculium* he has.

LAW 4.

What things are called moveable, and how they are acquired by prescription.

Those things are called moveable which men can transport from one place to another, or which move naturally of themselves. And those that can be transported, are such as cloth, books, corn, wine, oil and all others of a like nature: and those that move naturally of themselves, are such as horses, mules and other beasts, flocks, birds, and other like animals. Wherefore, we say, that every moveable thing, not obtained by theft, robbery or violence, may be acquired by prescription, as also the fruits and rents they yield: but if obtained by that means, neither they nor their fruits or rents, can be acquired by prescription. (1)

LAW 5.

When the buyer can acquire the young of a female slave or mare, or cow, or other like thing, which had been obtained by violence, theft or robbery, and sold to him.

If a man sell or alienate a female slave, or a mare, or cow, or other thing, that gives an increase of itself, and which he had obtained by theft, or robbery, or violence: we say, that if the purchaser bought in good faith, believing that the thing belonged to the seller, or that he had not obtained it, in bad faith, or by unlawful means; then the purchaser will acquire, by pre-

scription, the fruits which the thing had conceived and brought forth, after he had bought it and while it was in his possession. But if after he had bought it, and before it had conceived, he knew that the seller had obtained it, by unlawful means; then he can not acquire by prescription, the increase which the thing naturally produced. Nevertheless, if after it had conceived, being already in his possession, he discovered that it did not belong to the seller; but did not know that the latter had obtained it by theft, robbery or violence; still he may acquire by prescription the fruits it produces. Yet if he knew that the seller had obtained it by unlawful means; then he can not acquire by prescription, either the increase, or the mother that produced them. If, however, after the thing had brought forth, he discovered that it was obtained by violence, theft, or robbery, but did not know it before; and he had then informed the owner of the fact, telling him that he might assert his claim, if any he had, and the owner chose not to do it; the buyer might then acquire the increase by prescription. And so we say it would be, where the buyer desired to give such information to the owner, but who was at so great a distance, that he could not send to communicate it to him. (1)

LAW 6.

That neither a thing sacred nor a free man can be acquired by prescription.

A thing sacred, holy or religious, can not be acquired by prescription; nor can a free man, however

(1) R. l. 5. tit. 15. b. 4.

long he may have been held in a state of slavery. We likewise say, that the right of hearing and determining causes, though enjoyed for a season, can not be acquired by prescription; unless the king, or other lord of the place, having that power, had expressly conferred it. We also say that tributes, imposts, duties, and other taxes belonging and usually paid to the king, can not be acquired by prescription; nor can the right of being exempt from paying them, though the party may not have paid them for a time, or may have concealed himself, or paid them to another. (1)

LAW 7.

That neither the public places, nor roads, nor pastures, or thrashing ground, nor other like places which belong in common to the people, can be lost by prescription; and of other things.

No public place, street, road, pasture or thrashing ground, nor other similar place, used in common by the inhabitants of any city, town or castle, or other place, can be acquired by prescription. But things of a different nature, as slaves, flocks, cattle, or ships or the like, though they belong in common to any city or town, may nevertheless be acquired by a prescription of forty years. For notwithstanding they are held in common by all the inhabitants, yet they are not used in common by all of them, as are the other things before mentioned. If however the city, or town, or other place that had lost any such thing by the prescrip-

(1) R. 1. tit. 15. b. 4.—*ibid.* l. 2. tit. 13. b. 6.—*ibid.* l. 1, tit. 18. b. 9.

tion of forty years, petition within four years thereafter, either the king or president, or judge of the place, praying that they may not be prejudiced by the time elapsed, and that they might not lose the thing thereby, the prayer of their petition ought to be granted; and the prescription of forty years will not prejudice them. But if they do not petition within four years next after the forty, they cannot do it afterwards; and he who held the thing will acquire it, by the forty years prescription.

LAW 8.

That a minor under twenty five years of age, or a son under the power of his father, or a married woman, do not lose their property by prescription.

A minor under twenty five years of age, can not lose his property by prescription. Yet, where prescription had begun to run against him, after he came of full age, his property may be acquired in that way, like every other persons. We likewise say, that no one can acquire the property of a child, while he remains under paternal authority: for the father may sue for the property of the child, whereas the child can not bring suit himself, unless by the father's command. And we moreover say, that the property which the wife brings in dowry, to her husband, can not be acquired by prescription, until after the marriage is dissolved. Nevertheless, if the husband dissipates his estate, and his wife, though she knew of it, does not sue for her dowry: if, thereafter, any one should acquire the dotal effects

by prescription, it will be the fault of the wife, and she will sustain the loss. (1)

LAW 9.

In what time moveable things may be acquired by prescription, and what is necessary in that respect.

When a man intends to acquire a moveable thing by prescription, it is, in the first place, necessary, that he have possession of it, in good faith, and that he shall have acquired it by a just title; as by purchase, donation, exchange or the like. It is moreover necessary that he should believe that the person of whom he acquired it, was the owner of it, and had authority to alienate it. It is also necessary that he have possession of it, in person, or by another in his name, without interruption, during three years. He will then acquire the property in the thing; and though the owner may come afterwards and sue for it, he cannot be heard unless he can prove that it had been obtained from him by theft, robbery or violence. (2)

LAW 10.

That the purchaser does not hold a thing in good faith, which he is warned not to buy, by the owner who claims it.

Where the owner is dispossessed of a thing, which another who has it in possession, desires to sell, exchange, or give away; and the owner inform the person intending to buy, or to obtain it by either of these means; that the possessor had no right to sell or give or exchange the thing, nor had any right whatever to

(1) C. art. 56. & p. 486.

(2) R. ll. 3. & 6. tit. 15. b. 4—C. art. 75. p. 488.

it; If the buyer afterwards purchase it, or obtain it by other means, he will not hold it in good faith: and though he were to continue in possession three years, he would not acquire the property therein; for after being thus warned, it will be presumed that he bought or obtained it, in bad faith. If, however, at the time he bought the thing, or acquired it by other lawful means, he believed that it belonged to the person who alienated it; and he had not been informed in the manner above mentioned, that it belonged to another person; it will then be presumed, that he held it in good faith, until the contrary be proved.

LAW 11.

That he who buys the estate of an orphan, or a madman, or of the attorney of any one, by wickedly corrupting him, can not acquire it by prescription.

If a man buy a moveable thing of a minor, a madman, or idiot, or a prodigal, whose estate was under the care of a guardian, or obtain it from either of them by way of gift or exchange, or other similar means: he is presumed to have acted in bad faith, and can not acquire it by the prescription of three years. And so we say it would be, if he had bought it of the attorney of any one, by wickedly corrupting him with presents which he had given or promised him, to induce him to sell the thing for less than its value: if the owner can prove that fact, the other can not acquire it by prescription, though he had held it three years in possession: for by having corrupted the attorney, he is presumed to have been in possession in bad faith.

LAW 12.

That he who buys or receives a thing in exchange, ought to act in good faith.

Men may give or exchange things, not their own, to other persons who receive them in good faith, believing that they from whom they received them, had a right to alienate them. Wherefore we say, that if they to whom the things were transferred, received them in good faith, at the time they took possession; they or their heirs may then acquire them by prescription, after a possession of three years, notwithstanding they may have known, either anterior or posterior to the time of taking possession, that the persons from whom the things were received, were not the true owners thereof. But he who wishes to acquire a thing he had bought, by the prescription of three years, must have always acted in good faith, at both of the above periods of time: that is, he must have acted in good faith, when he bought the thing, and continued in good faith, until he took possession. But if a person who was put into possession of a thing belonging to another man, either by donation, sale or purchase, acts in bad faith before he had acquired it, by prescription in the manner above mentioned; and then sells or alienates it, to another, who knew that it was the property of a third person: he to whom it was so transferred, can not acquire it by prescription, because he acted in bad faith at the time of the transfer. (1)

(1) C. art. 72. p. 488.

LAW 13.

Whether, or not the master can acquire by prescription, a thing belonging to a third person, which his slave had bought with, his peculium, or by his master's command.

Where a slave holds of his master, a *peculium*, or a shop in which he exercises a trade, and with such *peculium*, buys any thing of a person who was not the true owner of it: if he bought it, in good faith, believing that it belonged to the seller, the master may acquire it by prescription, notwithstanding he knew that the person of whom the slave bought the thing had no right to sell it: unless the master had been present when the slave made the purchase, and did not forbid him, when he could have done so: for then he could not acquire it by prescription. We likewise say, that if the master command his slave to buy any thing, not telling him to do it with his *peculium*, nor specifying what thing: as if he were to say "buy me a horse, or animal, or other like thing," not saying of whom he was to buy it: in that case, the master may acquire the thing by prescription, though the slave knew at the time, that it did not belong to the person of whom he bought it, and the master had not come to a knowledge of the fact until afterwards. And so we say it would be where any one commanded an attorney to buy a thing, not specifying of whom. But if the person who received the command was a simple messenger, (*mensagero*) and not an attorney in fact (*personero*), then the good or bad faith of the messenger, will profit or prejudice the person under whose command he made the purchase. But if the master command his slave, or any other person whatever, to buy

any thing, expressly saying what thing; he can not acquire it by prescription, if he knew that the person of whom he ordered it to be bought, had no right to sell it, notwithstanding he who bought it by his orders, acted in good faith. And what we say in this law concerning slaves, applies in like manner to a son to whom the father had given a *peculium* to carry on any traffic.

LAW 14.

That a man may acquire the property of another person, believing he possessed it, by a just title, though it were otherwise.

If a man possess a moveable thing as his own, believing that he bought it, or that it had been given to him, or that he held it by other just title; and he afterwards discovered his mistake, he can not acquire it by prescription, though he should possess it three years. But if he had ordered his steward, attorney in fact, or other person in his employ, to buy any thing for him, or to obtain it by any other just title; as by exchange, donation or the like, if his servant, disobey his orders, and procure the thing by other unlawful title, saying that he had bought it, or had obtained it, in the manner he had been commanded: he may acquire it by prescription, after a possession of three years, as he acted in good faith in receiving it, though he were mistaken; and he shall not be prejudiced for an error, he had innocently committed.

LAW 15.

That a man may acquire by prescription, a Legacy, or payment, delivered or made to him, under the belief that it was due.

Men sometimes bestow legacies of moveable things by a will not valid, according to law ; or which they afterwards revoke by another will ; and the heir or person charged with its execution, pay the legacy under the belief that it is valid. Wherefore we say, that the person to whom the legacy is paid, may acquire it by prescription, if he have possession of it, during three years, without any demand being made of it. And so we say it would be, where a man had bequeathed a moveable thing by will, to any one, mentioning him by name, and another person of the same name come and receive it, believing that it was to himself the legacy was bequeathed : for if he hold it three years, without being sued for it, he will acquire it by prescription, notwithstanding the other, to whom it had been devised, should wish to prove that it was himself to whom the legacy was really bequeathed, and not to the person who had received it. We likewise say, that where one man gives a thing to another to whom he believed he owed it, and the person receiving it, believed it was due, when it was not so ; yet if the latter keep possession of it, during three years, without its being demanded, he will acquire it by prescription.

LAW 16.

That a man may add the time during which he possessed a thing, to the time it was held by the person from whom he obtained it.

A man may die after he had begun to acquire a thing by prescription, and leave it to his heirs; or he may bequeath it to them, as a legacy; or he may sell or give it, or exchange it, before the expiration of the time by which he might have acquired it by prescription. Wherefore we say, that if the person to whom it was transferred by either of these means, held it in good faith, and afterwards enjoyed it so long, that by adding the time of his own possession to that of the person from whom he obtained it, he might acquire it by prescription; he may then avail himself of the time it was respectively held by both. We likewise say, that if a man had begun to acquire a thing by prescription, and then pawned it to another person, before the time for acquiring it, had elapsed, he will not be prejudiced by parting from the possession of the thing: for he may count both the time it was held by himself, and that during which it was held by the pawnee, and thus acquire it by prescription, if the time both held it, be sufficient. (1)

LAW 17.

That one who holds a thing in pledge, does not lose his right, though another should acquire it by prescription.

Notwithstanding we have said that men may acquire by prescription, moveable things which they

(1) C. art. 43. p. 484.

had bought, or obtained by other just title, in good faith, and possessed during three years, as we have shewn in the preceding laws of this title: Nevertheless, if a moveable thing which a man wishes to acquire by prescription, had been pawned by the owner to a third person, before the prescription was complete, the pawnee will not thereby lose his right to the thing. (1)

LAW 18.

In how long a time things immoveable and incorporeal, are acquired by prescription.

Hitherto we have shewn how moveable things may be acquired by prescription: we shall now speak of things immoveable and incorporeal, and shew how and in what manner, they also may be acquired by prescription. We therefore say, that if one person receive of another, an immoveable thing, in good faith, either by purchase, or exchange or as a donation or legacy, or by any other just title, and keep possession of it, during ten years, while the owner was in the country (*tierra*), or twenty years, while he was out of it; such person will acquire the thing by prescription, notwithstanding he received it from one who was not the true owner; and he will not be obliged afterwards to answer therefor, to any person who should say he could prove he were the true proprietor of the thing, and that he was ignorant the other had acquired it by prescription. And what we say in this

(1) *R. l. 4. tit. 15. b. 6.*

law applies, where he who alienates and he who receives the thing, act in good faith, believing they had a right to do so, and the latter retains peaceable possession of it, so that it is not demanded (*demandado*) of him during the whole time necessary to acquire it by prescription. (1)

LAW 19.

If he who sold the thing, knew that he had not a right to alienate it, the person who received it, could not acquire it by prescription, in less than thirty years.

If a man who alienated an immoveable thing, knew, or had good reason to believe, that he had not a right to do so; then the person who received it, can not acquire it by prescription, in less than thirty years: unless the owner knew of the alienation, and did not demand it, within ten years from the day he knew it, if he were in the country, or within twenty years, if he were out of it: for then the person who received the thing, might acquire it by prescription, in one of the aforementioned periods of ten or twenty years. And the owner would be out of the country, when he was not in any part of the province where the thing was, which is acquired by prescription; and he would be considered as in the country, when he was in any part of the provinces, though he were not in the place where the thing was, which is acquired by prescription. (2)

(1) *R. ll. 3. & 6. tit. 15. b. 6.*—*C. art. 67. ff. 438.*

(2) *C. art. 69. ff. 488.*

LAW 20.

How the time for prescription, ought to be counted, when either the possessor, or owner of the thing, absents himself from the country.

A man sometimes begins to acquire another's property by prescription, while the owner is in the country; and before the time is completed, either he or the owner leaves the country. We therefore say that the time elapsed since the period the possessor of the thing began to acquire it, by prescription, until he or the owner departed from the country, ought to be computed in the same manner it is, to enable one to acquire a thing by the ten years prescription, when the owner is in the country. And the time that either of them is absent from the country, ought to be doubled, and counted in the manner we have said it should be, in order to enable one to acquire a thing by the prescription of twenty years, in the absence of the owner: so that if the possessor of the thing, hold it during five years, while both he and the owner are in the country, and ten years during the absence of either of them, he will acquire it by prescription. (1)

LAW 21.

That any thing, whatever be its nature, may be acquired by a prescription of thirty years, whether held in good or bad faith.

If a man have continual possession of a thing during thirty years or more, no matter how he obtained it;

(1) *R. art. 69. p. 488.*

and no suit be brought against him for it, during the whole of that time, he will acquire it by prescription, although it had been stolen or obtained by violence or robbery: and notwithstanding the owner may wish to claim it, he will not be obliged to respond thereto, but may avail himself of his prescription. But if the owner had been dispossessed of the thing, whether by losing it, or otherwise; he can not bring a suit for it against the person in whose possession he finds it, unless the latter had himself stolen it, or obtained it by violence or robbery; or had borrowed or hired it, for then the owner may reclaim, and recover it. And so we say it would be when the plaintiff had been put into possession of any thing by the judge, because the defendant, who had acquired it by a prescription of thirty years, had failed to answer to a suit brought against him: for then if the defendant appear within one year afterwards, and be willing to answer to the suit and pay the costs, he may recover the thing. We likewise say, that if a man possess an immoveable thing, in good faith, during thirty years or more, believing that it belonged to him, or that it had belonged to his father, or that he held it by any other just title; he will, in that time, acquire it by prescription and may thereby defend himself against every suit brought for such thing. And if he happen to lose possession of it, he may reclaim it wheresoever he finds it, unless he had found it in the possession of the true owner: for then if the latter had recovered possession of it, without

force or fraud, and can prove his right of property in it, he will not be obliged to restore it. (1)

LAW 22.

That a man may, by thirty years prescription, lose the debts that are due him ; though he will not, in that time, lose the things he had hired out,

If a man has it in his power to make a judicial demand of what is due him, and neglects to do it, during thirty consecutive years; if he afterwards make the demand, the debtor may defend himself by pleading prescription, and can not be compelled to pay, unless he choose. Nevertheless, if a man held a house, vineyard, or other estate, which he had hired or leased, of another, at a specific rent, payable at a certain time in every year ; he could not acquire it by the prescription of thirty or more years, because he did not possess it for himself, but in the name of the person from whom he had hired or leased it. (2)

LAW 23.

In what time a slave regains his freedom.

If a slave enjoys his freedom, during ten years, while his master was in the country, or twenty years, while he was out of it; and the master during that time, had instituted no suit, touching his slavery : if the slave acted in good faith, believing he was free, he can not thereafter be claimed as a slave, neither by his master, nor any one for him; and if he be so

(1) *R. ll. 4. & 5 tit. 15 b. 4.—C. art. 66. p. 486.*

(2) *R. l. 6. tit. 15. b. 4.—C. art. 45. p. 484. & art. 65. p. 486.*

claimed, he may avail himself of this prescription and obtain his freedom. But if he had acted in bad faith, knowing he was a slave, and had run away ; he can not then avail himself of such prescription, unless he had fled among the Moors. But if he enjoyed his freedom during thirty years, he cannot afterwards be claimed as a slave, notwithstanding he had run away, in bad faith, and had gone among christians. We likewise say that the service which one house or building owes another, may be acquired or lost by prescription, in the manner we have mentioned in the laws of the title which speaks of that matter.

LAW 49.

That a free man can not be reduced to slavery by prescription,

If a man be free, no matter how long he may be held by another, as a slave ; his state or condition can not be thereby changed ; nor can he be reduced to slavery, in any manner whatever, on account of the time he may have been held in servitude.

LAW 25.

If a slave pass for a freeman at the time of his death, a suit may be instituted against his children, within five years from that period, but not afterwards.

If, at the time of his death, a slave passed for free, acting in good faith and believing he was so : his master may bring a suit against his children or estate, if any be left, within five years from the day he died ; and if the master does not bring it, within that time, he can not afterwards, neither he, nor any other person, whatever may be his rank, though it were the king or

council of any town, or any other person who desired to make the claim. But if a free man happen to be held as a slave at the time of his death : and any relation, or other person who inherited his honors or titles, or his estate, wishes to institute a suit, touching the condition of the deceased, and to prove that he was free ; he may do it, within five years thereafter, or at any other time whatever.

LAW 26.

In what time the church may lose its property by prescription,

No immoveable thing belonging to a church or religious place, can be lost by a prescription of less than forty years. But their moveable property, if of such a nature as to be lost by prescription, may be acquired of them in three years, in the same manner we have said it may be acquired of other persons. But those things which belong exclusively to the Roman church, can not be prescribed for by any one, in a less time than one hundred years. (a)

LAW 27.

That the pawnee may lose, by prescription, his right to the thing pledged.

When a thing, whether moveable or immoveable, has been pledged, and afterwards transferred by sale, or other just title, to a third person who keeps possession of it, in good faith, during ten years, while the pawnee was in the country, or twenty years, while he

(a) The translators have considered this law as still in force, unless repealed by art. 65. p. 486 of the Civil Code.

was out of it: if during the whole of that time, it had not been judicially demanded of such third person, he will acquire it by prescription, and the pawnee will lose his right to it. Nevertheless, if the person to whom it had been so transferred, received it, in bad faith, knowing it was pledged, and that he from whom he received it, had no right to alienate it; he can not then prescribe for it, in a less time than thirty years: but after that time, if it had so long remained in his possession without being demanded by the pawnee, he will acquire it by prescription, and the pawnee will lose the right he had to it. But if the thing pledged had remained in possession of the owner, or his heirs, or of another person to whom he had since pledged it a second time, neither of them can acquire it by a prescription of less than forty years.

LAW 28.

Who they are that do not lose their property by prescription, in their absence.

If a man be absent in the army, or be sent on a mission by the king or his council; or had fallen into captivity, or were in the public schools, learning any science, or had gone on a pilgrimage, or the like, and any one had begun to acquire his property, by prescription, during his absence; we say, that he may, at any time, within four years after his return, petition the judge of the place, praying that the time by which his property had begun to be acquired, shall not prejudice him; and the judge shall grant his request. But if he does not so petition the judge, within four

years after his return; or if it is not done by his heirs, within four years from the day they knew of his death in either of the above mentioned places to which he had gone; he can not do it afterwards, and the third possessor will be protected in what he had so acquired by prescription. (a)

LAW 29.

How the prescription by which a man has begun to acquire a thing, is interrupted or destroyed.

The prescription by which a man had begun to acquire a thing, is interrupted or destroyed by abandoning the thing or losing possession of it, before the time is completed in which it may be acquired: so that though he recover possession of it again, he cannot add the time past to that which is to come, in order to make out the prescription; but he must begin to count anew from the day he recovered possession of it. We likewise say, that where a man had begun to acquire a thing by prescription, and the owner against whom he began to prescribe, summon him therefor by letters from the king or judge, or by a constable (*portero*,) or bring a suit against him for it: from that time the prescription will be interrupted and destroyed. Likewise we say, that if a man owe another any thing which he was bound to give him, and the creditor remain so long without demanding it, that the other began to acquire the debt by prescription: if then the debtor renew the obligation, by executing an

(a) The translators consider this law in force, unless repealed by art. 67 of the Civil Code, p. 486.

act, or giving security or a pledge for it; or by paying something by way of damages, or as a part of the debt; or by doing any thing else of a similar nature, after he had begun to prescribe for it; the prescription will be thereby interrupted and the time lost during which it had already run. And so we say it would be, if the creditor demand the debt, in the presence of friends or of arbitrators.

LAW 30.

Where the possessor of a thing departs from the country, or dies, leaving a child under seven years of age; or where he is a man of great rank and power—what the owner of the thing ought to do in that case, to prevent its loss by prescription.

Where a man had begun to acquire a thing by prescription, and then departs from the country; or becomes mad, or dies leaving an orphan, under seven years of age to whom no guardian is appointed: if on that account, the person against whom the prescription had begun to run, could not bring a suit for the thing, in a court of justice, then, we say, it will be sufficient for him, to make a declaration before the judge of the place, or before the bishop, if there be no judge; or before the neighbors of the person who had begun to prescribe for the thing; saying that he wished to bring a suit for it, but could not on account of the causes before mentioned. For by such declaration, the prescription which had begun to run, in favor of the other will be interrupted and destroyed in the same manner as if the thing had been claimed by judicial demand. And so we say, it would be where the per-

son who had begun to acquire the thing by prescription, were a man of such great power, that the proprietor was afraid to bring a suit against him for it. (a)
(1)

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code which relate to the titles of LAS SIETE PARTIDAS, which treats of the manner in which possession of things is required.

Digest lib. 41. tit. 2. - - - - De Acquirenda vel Amittenda possessione.

Code lib. 7. tit. 32. - - - - De Acquirenda et retinenda possessione.

Domat's Civil Law, vol. 1. part 1. book 3. tit. 7.

Civil Code, book 3. tit. 20. p. 472.

How possession of things is acquired.

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(a) The whole of this law has been translated, leaving it to the proper tribunals to determine, whether any, or what part of it, is in force.

(1) *R. l. 7. tit. 15. b. 4.*

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TITLE XXX.

In how many ways a man may acquire possession of a thing.

LAW 1.

What is meant by possession.

By possession is meant, the putting, as it were, the foot upon a thing. And according to what is said by the ancient sages, possession is the lawful detention both bodily and mentally, of a corporeal thing. For things incorporeal, as the services which one estate enjoys over another, and the right a man has to claim the debts that are due him, and other similar things not of a corporeal nature, cannot be possessed or held corporally : but the use made of such service by the person having a right to enjoy it, with the consent of the owner of the estate from which it is due, forms a sort of possession. (1)

LAW 2.

How many sorts of possession there are.

There are two sorts of possession : the one natural ; and the other arising from the operation of law, which is called in latin civil. It is natural, where a man holds a thing corporally ; as his house, his castle, or estate, or other like thing, where he stays. It is civil, where a man goes out of his house, or estate, or castle, or other thing which he possessed, not with the intention

(1) C. art. 16 & 17. p. 476.

to abandon it, but because he can not always stay in it. For then, though he does not possess the thing corporally, yet he does, in his will and understanding, which has the same effect, as if he possessed it in person.

LAW 3.

How a man may acquire possession of a thing.

Every man of sound mind, may acquire possession of a thing himself: or it may be acquired for him, by his children or slaves under his power, or by his attorney. For whatever they take possession of, in the name of their father, master or constituent, he, in whose name they acted, will acquire possession of it, in the same manner, as if he had taken it himself. We likewise say that if a child, while he is under the power of his father, get possession, in his own name, of any thing not among those called *castrense* or *quasi castrense*, that not only he will thereby acquire possession of it, but also his father, in virtue of the usufruct he has, during his life, of the gains made by his son, according to what is said in the title (a) which treats of the power which fathers have over their children.

LAW 4.

That the guardian of an orphan, or madman, or the officer of the council of a city, may acquire possession for those whom they represent.

The guardian of an orphan, or madman, or lunatic, or prodigal, may acquire possession of a thing, in the

(a) Part. 4. tit. 17.

name of his ward. We likewise say that if the officer of the council of any city, or town, who is appointed to manage and receive its revenues, take possession of any thing, in the name of the council whose officer he is ; he will thereby acquire possession for such council whose effects he administers, in the same manner, as if all the inhabitants of the place, had taken possession in common. (1)

LAW 5.

That laborers and husbandmen, and they who take things on a lease or hire, do not acquire possession thereof.

Although labourers and husbandmen and lessees detain things belonging to other persons ; nevertheless the true possession always remains in those of whom the things are held ; and therefore, however long they are so held or detained, they cannot be thereby acquired by prescription. But they who are in possession of an estate, held by feudal tenure, or from which they derived a usufruct, or for which they paid a quit rent, by giving something certain, each year, would be in *actual* possession of the same ; though the property thereof would always remain in the owner, so that the possessors never could acquire it, however long they remained in possession. (2)

LAW 6.

What he must do who wishes to acquire possession of a thing.

Two things are necessary to enable a man to acquire possession of a castle, a house, or any other object

(1) R. l. 4. lit. 15. B. 4.

(1) R. l. 4. tit. 15. B. 4.

whatever. The one, that he should have the intention to acquire it: the other, that he take corporal possession of the thing himself, or that another should do it, in his name. If either of these requisites be wanting, he can not acquire possession. Nevertheless if a man sell any thing, or give it away, or alienate it, in any other manner whatever, the thing being in the presence and sight of both parties, and the alienor tell the alienee to take possession of it: though the latter should not enter upon it, or take corporal possession of it; yet such delivering by sight, will suffice to give him, the possession of it. (1)

LAW 7.

That a man acquires the possession of merchandize, by delivery of the key.

If one man sell another, wheat, wine, oil, or any other kind of merchandize which is contained in a granery, or storehouse, or any other building, and deliver to him the key of the place so containing it, both parties being on the spot; a delivery so made, by giving the keys, is understood to be a delivery of the merchandize in the buildings, though it should not be seen, as it is by the key that the building is opened: and the buyer thereby acquires possession of the goods, in the same manner as if he had taken them corporally. (2)

(1) C. art. 29. p. 350.

(2) C. art. 27. p. 350.

LAW 8.

That a man acquires possession of a thing, by the delivery of the title to him.

Where one man gives another, an estate, or any other thing whatever, and delivers to him, the title he already has, or makes and delivers to him, a new one : the donee will acquire possession of the thing, though it had not been delivered to him corporally. (a) (1)

LAW 9.

That if a man alienate a thing or farm it of another, he thereby loses possession of it.

A man sometimes alienates his estate, with a reservation of the usufruct ; or after he has alienated it, and before he delivers possession, leases it of the purchaser. In either of these cases we say, that the purchaser will acquire the possession and property of the thing, in the same manner as if he had been put in corporal possession of it. And so we say it would be, if he who alienated the thing had said, " I consent hereafter to hold possession of it, in your name." (2)

LAW 10.

That a man acquires possession of a thing on its being delivered to him by the owner.

If a man be put into possession of a house, or estate, or any other thing whatever, by the person who held

(a) In *Pierce vs. Curtis*, the Supreme Court determined that the vendee does not acquire possession, even of real property, by delivery of the title, so as to protect it from seizure on execution, in favor of a third person. Mart. Rep. vol. 6. p. 418.

(1) C. art. 29. p. 350.

(1) C. art. 29. p. 350.

it, or by his order ; he will acquire the lawful possession thereof. And so we say it would be, where a thing had been delivered to him, by the judge, or his order, in payment of a debt ; or in virtue of a judgment rendered in his favor, on proving that it belonged to him. But if he had entered upon it because his adversary had failed to answer to his suit ; or had taken possession of it, by force, or robbery ; no matter who may have held it, he will not thereby acquire the lawful possession : for when the true owner appears, he may recover it, as we have said in the laws which speak of that matter. (a) (1)

LAW 11.

That the purchaser acquires possession of a thing bought by himself or his attorney.

If a thing be sold or alienated to a man in possession of it, with the knowledge of the owner who does not oppose it ; the former will acquire the lawful possession thereof, in the same manner as if it had been delivered to him, by the owner himself. And so we say it would be, if he who alienated the thing, had delivered it, to the attorney of the buyer : or if the buyer, after he had purchased it, had delivered it to any other person, to hold in his name : he will in either of these cases, acquire, and retain possession of the thing.

(a) *tit. 8. ll. 2 & 6. Eod. part.*

(1) *C. art. 29. p. 350—art. 41. p. 482.*

LAW 12.

That when a man is once in possession of a thing, he is presumed to be always in possession, until he abandons it, with an intention no longer to retain it.

When a man has once acquired possession of a thing, he is presumed to be always in possession, whether he holds it corporally or otherwise, until he abandons it with an intention no longer to retain it : for though he cannot, all his life, hold it corporally yet he may retain it in his mind. And not only may such possession be held by him in person, but by his attorney, labourer, friend, guest, son or slave, or any of them who holds and uses the thing, in his name.

LAW 13.

That the owner does not lose possession of the thing leased, when it is abandoned by the lessee.

If a tenant maliciously abandon a thing which he had rented or hired, because another had taken possession of it : the owner will not thereby lose his possession nor be injured by the fraud : but the tenant, on the contrary, will be obliged to make amends for all the damage or injury he had caused to the owner. But if the tenant deliver the thing which he had rented or hired, to another person, with an intention of causing the owner to lose it ; or if he be driven from it by force : in either of these cases, the owner will lose the possession, though he will retain the property of the thing ; and he cannot enter upon it, or expel the person in possession. But he may complain to the judge of the place, either of the person who had rented

or hired the thing, and had delivered it to another ; praying that he may be condemned to restore it, with all the loss and damage incurred on that account : or of the person who had expelled him, praying for reparation, according to the laws of this code. (a)

LAW 14.

In how many ways a man may lose possession of a thing.

As there are certain ways in which a man may gain possession of a thing, so there are certain others in which he may lose it, when once acquired. They are first ; by the inundation of rivers, or by the increase of the sea, by which the thing is so covered with water, that neither the possessor, nor any one for him, can any longer retain possession of it. Second ; where the thing possessed be moveable, and had fallen into the sea, or a river. But in such case, though the possession be lost, the owner will always retain his property, so that he may claim it of any person that finds it. Third ; where one buries, or consents that a man be buried in any place he possesses, with the intention that he should always remain buried there : for the place would, thereby, become religious, and the owner would lose possession of it : and this because no man can possess a religious, holy or sacred place, as he can other things.

(a) *part. 5. t. 8. l. 18.*

LAW 15.

What ought to be done to a house which threatens to fall, and of which the neighbors are afraid.

Where a house, tower or other edifice threatens to fall, and the neighbors fearing some damage therefrom, require the owner to pull it down, or repair it, or to give security to make good the damage it may cause to the place : if he refuse to comply, and the judge, in consequence of such refusal deliver the building to his neighbors ; the owner will thereby lose possession, so long as he continues contumacious. (1)

LAW 16.

That persons enfranchised, lose possession of their property by again falling into slavery.

(Not in force)

LAW 17.

In how many ways the possession of an immoveable thing is lost.

In losing possession of things, a distinction must be made between those that are moveable, and those that are immoveable : for the possession of an immoveable thing is not lost, except in one of the three following ways. The first, is where the possessor is expelled by force. The second, where another enters upon the thing, during his absence, and on his return refuses to let him re-enter. The third, where he is informed that another has entered upon a thing of which he was in possession, and

(1) C. art. 19. p. 130.

he is not willing to return to it, from a suspicion that he will not be permitted to enter, or if he enter, that he will be expelled by force. Yet whoever loses possession in either of these three ways, retains the right of suing, to recover it again, as well as the property in the thing itself. But if it be a moveable thing, the possessor may lose possession of it, though he were ignorant of the time when he lost it : as would be the case where the thing had been stolen. Yet where a man loses a moveable thing of which he had the possession or care, he is understood to be always in possession, as long as he goes in search of it. But if the thing were not in the keeping of the owner, he having lent, hired or leased it to a person who had lost it, then the owner will lose possession of it : unless it be a slave ; for though a slave be lost, when he was not under the care of his master, yet the master always retains possession of him.

LAW 18.

How a man loses possession of birds and beasts.

Where a man had taken fish, or caught birds, or wild beasts by hunting, and they afterwards escape from his power, he will lose possession of them. And so it would be, if he had put them in a place of great extent, though it were enclosed ; or had put fish in a pond or pool, though the contrary is practised. (1)

(1) C. art. 5. §. 474.

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code
which relate to the title of LAS SIETE PARTIDAS, on ser-
vices.

Digest lib. 8. tit. 1. - - *De Servitutibus.*

Digest lib. 8. tit. 2. - - *De servitutibus prædiorum urbano-
rum.*

Digest lib. 8. tit. 3. - - *De servitutibus prædiorum rus-
ticorum.*

Digest lib. 8. tit. 4. - - *Communia prædiorum tam urba-
norum.*

Digest lib. 8. tit. 5. - - *Si servitus vindicetur &c.*

Digest lib. 3. tit. 6. - - *Quemadmodum servitutes amit-
tuntur.*

Institutes lib. 2. tit. 3 - - *De servitutibus rusticorum et ur-
banorum prædiorum.*

Code lib. 3. tit. 34- - - *De servitutibus et Agua*

Domat's Civil Law - - Vol. 1. part. 1. book 1. tit. 12.

Civil Code - - - - - Book 2. tit. 4. p. 126.

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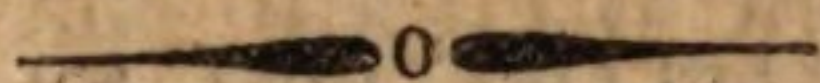
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TITLE XXXI,

*Of the services which some things have upon others,
and how they are created.*

LAW 1.

What a service is, and how many sorts there are.

The sages have properly said that a service (*servi-
dumbre*) is the right and use which one man has in the

buildings and estates of another, to use them for the benefit of his own. There are two kinds of service. The first is, that which one house has on another, and which in latin, is called *urbana*. The second is that which one estate has on another, and is called in latin *rustica*. There are likewise other services which a man has in the things of another, for his personal advantage, and not for the particular advantage of his estate. As where he has the usufruct of gathering the products of another's estate ; or the use of the house in which he dwells, or of the houses of another ; or of the work of slaves who are artisans or labourers. We shall speak of each of those in the laws of this title. (1)

LAW 2.

What are denominated urban (urbana) services, and how many kinds there are.

We have said in the preceding law, that the service called in latin *urbana*, was that which one building has on another. As where one house has to sustain the weight of another, when a neighbor places thereon, a pillar or column to support a beam of the roof or story of his house, or any other like superstructure : or where one has a right to pierce his neighbor's wall, to insert a beam, or to open a window, to let the light enter his house : or where one house is obliged to receive the water falling from the roof of another, and coming through troughs, pipes or otherwise : or

(1) C. art. 1. p. 110—at. 63 & 64. p. 124 & art. 50. p. 138.

where one house enjoys such a service over another, that the latter can never be raised higher than it was at the time the service was created, so as to shut out the view or light from the other, or to discover what is done in it : or where a man enjoys the service of entering by the house or yard of another, to his own house or yard, or any other like service established for the benefit of buildings. (1)

LAW 3.

What are denominated rural (rustica) services ; and how many kinds there are.

We have said that a rural service was that which one estate has in another : as where a man has a path, road or way through another's estate, to pass in or out of his own. And we say that when one grants the right of a path (*senda*) through his estate, the grantee may pass through the place where it was designated, either on foot, horseback, or alone, or with other persons, provided they go the one before the other, and not abreast ; but he can not pass there with carriages, nor lead packed horses by hand. And if one grants the right of a carriage way (*carrera*,) the grantee may pass there with carriages, and the other things mentioned above. And if a man grant a road, (*via*.) through his estate, then we say the grantee may pass there on foot, on horseback, either alone, or in company : or he may convey along there, carts, wood, stone, or any other thing necessary for the benefit of the estate, for

(1) C. art. 50. p. 138.

which the service was created. And the road ought to be of the width and in the place agreed upon between the parties at the time it was granted : and if no agreement had been made in this respect, then we say, it ought to be eight feet wide. And if it should not be straight, on account of windings or angles, it ought to be sixteen feet wide in those places, in order that carriages may turn. (1)

LAW 4.

That a man may have the service of drawing water from the estate of another.

Estates may serve one another, by entrances or ways running through them, as we have said in the preceding law. They may moreover serve one another, in a different manner, as by receiving aqueducts or other conduits, for water to pass to mills, or to water gardens, or other estates of other persons. Wherefore we say, that they 'who have a right to such services, must watch over and maintain in good order, the aqueduct, canal, or conduit or place in which the water runs, so that it neither become wider, nor higher, nor lower, nor do any damage to the person through whose estate it passes. And if it be a canal, or ditch that conveys the water to a mill, or for the purpose of watering a garden, or other lands, it ought to be lined by pallisadoes, and not with stone (*cantos*) which encumber the estate. And if the quantity of water be small, it ought to be conveyed through aqueducts made of earth, or leaden

(1) C. art. 50, p. 138 & 59, p. 140.

pipes under ground ; so that the water may be used without loss to those through whose estates it passed, or without prejudicing them by the construction of new works there.

LAW 5.

That the right of service which a man has of drawing water from another's fountain, cannot be granted to a third person, without his consent.

If a man has acquired the service of drawing water from a fountain which rises in another's estate, for the purpose of watering his own ; and the owner of the fountain wish to grant to a third person, the right of taking water therefrom ; he cannot do it without the consent of him to whom the first service was granted ; unless the water be in sufficient abundance for both estates.

LAW 6.

In what manner a man ought to use the service he has of watering his cattle at another's well, or fountain, or pool.

If there be a fountain or well on the estate of another, or a pool contiguous to it, and the owner grant a right to any one to water his cattle and labourers there ; he ought, as a consequence of such grant, to permit the grantee to enter, or go out from the water as often as he had need. We also say, that where a man grants to another the right of always putting his oxen or beasts of labour upon his meadow, or pasture ; by such grant, the grantee acquires the right of service in the meadow, or pasture, and he may enjoy it, both he and those who own the estate in favour of

which the service is granted : and though the meadow or pasture should be sold or alienated, he to whom it passed, cannot prevent the use of such service. (1)

LAW 7.

Of the right of service which a man has to take earth from another's estate, to make vessels, to put his wine, or oil in : and how he ought to use such service.

If a man should want earth to make vessels to contain the oil he extracted from his olive garden : or if he should have any other estate upon which he wished to erect buildings, to contain the fruits growing on it, and any one should own an adjoining estate upon which were materials fit for such buildings : as earth proper for making jars or tiles ; or stones suitable for building or for making lime ; or sand or other like thing : and the owner of such adjoining estate, grant him the right of always taking any of the things herein enumerated therefrom, the grantee may avail himself of such grant, so far as is necessary for the preservation of the fruits gathered from the estate, in favour of which the service is granted, and no more.

LAW 8.

That a man does not lose the right of service he had in the thing of another person, though it should be sold, or transferred in any other manner whatever.

The property in estates is often transferred from one person to another. We therefore say that in whatever manner a house or building may be alienated, or

(1) C. art. 59. p. 140.

an estate or other thing which owed a service to another, in one of the ways mentioned in the preceding law, or in other the like ; it will ever remain burthened with the service in favour of the estate, or person to which it was before due. We likewise say, that to whomsoever the estate entitled to the service, may pass, it will always preserve its right of service which it before had over the other estate, and it will be in no wise impeded or lost by such transfer ; unless the service were imposed for a certain time, or for the life of a certain person. For services that are perpetual, are not created on account of the persons whose they are, but on account of the things to which they are due, and those who use them, and are not therefore affected by the transfer.

LAW 9.

That each of the heirs may demand the whole of the service which had been granted in favour of the estate of which he is co-heir.

If a man grant a service upon his house or estate, in favour of the house, or estate of another, and the grantee afterwards die ; each of his heirs however numerous they may be, may demand the whole of the service : for it is indivisible, and they can not therefore claim their parts separately. And so we say, that where the grantor dies, leaving many heirs, the whole of the service may be demanded of either of them, and they will be bound therefor, in the same manner as was the ancestor from whom they inherited. (1)

(1) C. art. 61. ff. 140.

LAW 10

That all the co-proprietors of a building or estate, must concur in granting a service thereon.

Every proprietor may grant a service upon his house or estate. But where there are several proprietors who are willing to grant a service upon a house or estate belonging to them in common, they must all concur in granting it. If however some only of them make the grant, they cannot afterwards contest the right of the grantees; but the others who did not consent, may contest such right, each for his own part, as well as for the part of every one who did not concur in the grant, as they will not be bound, nor can they be prejudiced by the agreement of those who did consent. Yet if they who opposed the grant, afterwards consent to it, the effect will be the same, as if all of them had concurred in the first instance.

LAW 11.

That a man may impose a service upon a thing which he holds by feudal tenure, or on paying a certain rent.

Men sometimes hold estates, houses or other buildings in such way, that though they possess, they are not the true proprietors of them: such are the estates which they hold by feudal tenure, or during their lives, or the lives of their heirs, by paying a certain rent, or rendering a certain service. Wherefore we say, that if any one who holds such an estate, grant a service upon the same, in favour of a third person; or if such third person grant him a service upon his own estate, in favour of the estate held by the former: both such

services would be for ever valid, in the same manner as if the grantors had made them upon their own estates. We likewise say that where a man buys a house, or other building, or an estate, and the buyer and seller agree that the thing sold shall be subject to a service in favor of another's house, or edifice, or estate which belonged to the seller, or any other person: the service so agreed to by the purchaser, though the thing bought had not yet passed under his power, will be as valid as if it had been granted upon any estate of which he was already owner and possessor.

LAW 12.

That the service cannot be sold, seperately from the thing to which it belongs.

Where one house or estate owes a service to another house, or estate, the proprietor of such service can not sell it separately from the thing to which it belongs: for it is of such a nature, that it can not be separated from the estate or edifice, upon which it is imposed; unless the owner thereof should consent: or unless the service be the use of water which rises in one estate, and runs into another: for the proprietor of such a service, may grant the use of the water already come upon his estate, to a third person to water his fields, or vineyards.

LAW 13.

Upon what things services may be granted.

A man may impose services upon his own estate, or upon one which he holds in the manner mentioned above. And such services are here understood, as men

impose upon their estates for the benefit of the estates, or houses of third persons, and not their own. For a man should not use that which belongs to him, as if it were a service only ; but as his own property. We likewise say that services cannot be imposed upon things holy, sacred, or religious ; nor those which are used for the common benefit of a city or town ; as the market and other public places, and public threshing grounds, and others of a similar nature.

LAW 14.

In how many ways a service may be imposed upon things.

Every service that we have mentioned in the laws of this title, which one house, or thing can owe another, may be imposed in the three following ways. The first, where the proprietor of a thing voluntarily imposes upon it, a service in favour of another person, either through affection, or for a price which he receives of him. The second is that which is granted by will : as where the testator says : “ I consent that the house
“ of such a one enjoy a service upon my house, which
“ shall never be raised higher than it now is : or that
“ he may put the beams of his house upon the walls
“ of mine :” or where he grants any other similar service : as the right of way to enter and pass out of his estate, or to draw water for the purpose of watering the lands of the grantee, or other the like. The third is where one acquires a service upon the estate, or house of another, by prescription, as we shall hereafter shew. (1)

(1) C. art. 53. p. 138. *ibid.* art. 3. p. 426.

LAW 15.

In how long a time a man may acquire by prescription a service which he has upon the estate of another.

If the service be of such a nature that it is daily used, without labour on the part of the person who enjoys it : as if it be an aqueduct conveying water from a fountain which rose in another's field, or the like : and a neighbour make use of it, during ten years to water his estate, while the owner is in the country, without his making any opposition ; or during twenty years, while he is out of it ; acting in good faith, believing he had a right to do it, using no force, nor acting under the permission he had obtained from the owner of the fountain, or field through which it passed : he will then acquire a service in such an aqueduct by prescription. And so it would be, where any one had put a beam upon his neighbor's wall, or had opened a window in it, for the admission of light into his house : or had opposed his raising his house any higher, that it might not exclude the light : or where he had extended the roof of his house over that of his neighbor, so as to cause the rain water to fall on it : these and all other similar services which may be enjoyed without daily labor, may be acquired in the same manner as the service of the aqueduct above mentioned. But with respect to other services which men make use of, for the benefit and cultivation of their estates, or for working on their buildings, and which they do not use daily, but by intervals and particular acts : such as the use of a path, way, or road through another's lands ; or the use of water which they resort to, only once a

week, or month, or year, and not daily : these and such like services can not be prescribed for, by the above mentioned time ; and, can only be acquired by being used by those who claim them, or by those from whom they are derived, during so long a time that the memory of man runneth not to the contrary. (1)

LAW 16.

In how long a time a man loses a service, when it is not used by himself, or another person for him

Men are liable to lose services which they had acquired, by neglecting to use them themselves, or causing them to be used by others, in their names. But here a distinction must be made between services which belong to buildings, and those which belong to estates. For if a man have the right to place a beam on another's wall, or of opening a window in it, for the admission of light into his house : such and other like services may be lost by the owner's ceasing to use them, during ten years, while he was in the country, or twenty years, while he was out of it ; if the person who owed the service had, for that length of time, removed the beam from his wall, or stopped up the window where the light entered ; or prevented the use of the service, in any other way, in good faith, believing he had a right to do so : otherwise the owner of the service would not lose it, though he had ceased to use it, during the above mentioned time. But services due

(1) C. art. 51, 53 & 54. p. 138.

on estates, if they be of such a nature, as to be enjoyed without any actual labour, can not be lost, unless by such a long disuse of them, as that they shall be obliterated from the memory of men. And if they be of such a nature as to be used at intervals, and not daily, as we have said in the preceding law; they may then be lost by disuse, during twenty years, whether the owner were in, or out of the country. (1)

LAW 17.

That a service is extinguished by being joined to a purchase reciprocally made, either of the service itself, or of the thing upon which it was imposed.

A service may be lost in two other ways than those above mentioned. The first, is where it is abandoned by the sole proprietor of the thing to which it is due: but if the house or estate to which it is due, belong to several proprietors; one of them can not release it, without the consent of the others. The second is where the owner of the estate which owes the service, buys that to which it is due. For by the union of the two things in the same proprietor, the service is extinguished, so that though he should afterwards alienate the estate upon which it was imposed, or retain it himself, the service could not be claimed in future, nor will the thing so purchased, be subjected thereto, unless it had been afterwards renewed.

(1) C. art. 68, 69. p. 142.

LAW 18.

That one partner may acquire a service by using it alone, and without the other partner.

Where men own in common, a house or an estate, to which a service is due from another house, or estate, and they divide the thing they owned in common, and afterwards one of them only use the service which before belonged to them both, and the other cease to use it, for so long a time that it might be lost, according to what we said in the preceding law, he will then lose it by prescription ; and he can not avail himself of the time it was enjoyed by the former joint owner who neither used it for him, nor as his attorney. If however they do not divide the thing they possess in common, to which the service belonged, then the use which one of them makes of such service, will avail the other : for until the thing be divided the service is entire. But it would be otherwise after it was divided and therefore he who did not then use his part of the service, would lose it, as is said above.

LAW 19.

He who has a service, whereby he can hinder another from raising his house above a certain height, will lose it, if he permits the house to be raised above that height.

If one house owe another a service whereby the former cannot be raised any higher : or if the soil of one man be subjected to receive the water which falls from the roof of another's house ; and the owner of the house to which such services are due, grants, to the proprietor of the house, or ground from which they are

due, the right to raise the former house higher than it was before, or the right to erect any buildings upon the ground where the water fell ; he will thereby lose all claim to such services : for he will be presumed to have relinquished his right thereto, by consenting that new works be erected upon the place. (1)

LAW 20.

Of services called usufruct, or simply use.

We have fully treated in the preceding laws, of the services which one house, or building, or estate, may owe another. We shall now speak of the third sort of services mentioned in the second law of this title : that is to say, the service which a man enjoys in the house or estate of another, for his personal advantage and not for the particular advantage of his estate. And we say, there are three ways in which one may have a personal service upon the things of another. The first is where one man grants to another, for the whole of his life, or for a certain time, the usufruct of his estate, house, slaves, or cattle, or other things which afford a revenue or fruits. This usufruct may be granted either by contract or will. But the grantee ought to gather the fruits in good faith, first giving security that the thing of which he has the usufruct, shall not be lost or deteriorated by his fault, or by gathering therefrom, more than it is proper he should take ; and that in case he should die, or the time of his usufruct expire, in any other manner, the thing shall be restored to the grantor, or to the person to whom he might order it to

(1) R. l. 2. tit. 16. B. 5.

be restored, or to his heirs, if he be dead. And the usufructuary will acquire a right to all the fruits and revenues of the thing upon which the usufruct is granted, and may turn them to his own profit, or sell them, if he choose : but he can not sell, or pledge the thing itself——The second is where a man grants the use only of his house, or estate, or other thing, : in that case, the grantee can not enjoy the thing of which the use is granted, so fully as the usufructuary can do. For he who has the use only of a thing, can not gather more of its fruits, than are necessary for his support. As where the use of a garden is granted to him, he may take of its fruits or plants, so much as is necessary for his consumption, and that of his family ; but he can not take any, to give to others, or to sell. And so we say it would be, where any one had granted to another, the use of his meadow, vineyard, or other thing. And we moreover say that a man can not sell or pledge the thing of which he has the use : and that he ought to give good security that he will use the thing, in good faith, as a prudent man, and that it shall not be damaged, or deteriorated, or lost by his fault. (1)

LAW 21.

In what manner a man ought to enjoy the use which has been granted to him, upon another's house, slave, or beast.

Where a man has the simple use of another's house, he may dwell therein, with his wife, children and household ; and he may even receive guests there, if

(1) C. art. 1 & 4. p. 111.—*ibid.* art. 8. 21 & 23. p. 112 & 114—*ibid.* art. 66 & 69. p. 124.

he choose. And where one man grants to another, the use of his slaves or beasts, the grantee may employ them, in labouring only for himself, or in his service ; but he cannot hire, or lend them to others. We likewise say, that where one grants to another the use of his cattle, the grantee may conduct them upon his estate, that they may manure his ground and make it yield more abundantly : and he may use their milk, or convert it into cheese : or he may make use of their wool or young, for the maintenance of himself and household, but not to give or sell to others. (1)

LAW 22.

What the usufructuary ought to do for the thing, the usufruct of which is granted to him ; and that he ought to preserve improve, repair and cultivate it.

It is but right and just, that the usufructuary of a house, or an estate, or cattle, since he enjoys the profits thereof, should appropriate all he could, to improve, preserve, and faithfully keep the thing itself : so that if it be a house, he should repair and preserve it, that it might not fall or be deteriorated by his fault : or if it be an estate, vineyard, or garden, he ought to cultivate and improve it ; and if he took any trees therefrom, he ought to plant others in their place ; or if the usufruct be of cattle and some of them die, he ought to replace them by their increase, and rear others in their place. And if the thing itself be subject to the payment of tythes, or other tribute, or impost ; they ought to be paid by the usufructuary out of the

(1) C. art. 21. 75 & 77. p. 124 & 126.

fruits it yielded, so that the thing remain to the owner entire and unencumbered. But a person who enjoys the use only of a thing, is not bound to do what is above mentioned, for the benefit of the thing to the use ; unless the thing be so inconsiderable that the whole of its fruits were consumed in the enjoyment of the use ; for then he will be obliged to improve, preserve and pay for it, in the manner above prescribed. (1)

LAW 23.

What is acquired by the grantee of the usufruct, or labour of a slave.

Where a man has a right to the usufruct, or labour of the slave of another, he will acquire all the slave gains by his manual labour, or by means of the funds belonging to the usufructuary. But the gains made by the slave from what was given, or left him by will, belong exclusively to his master : unless the donation, or legacy was made with the intention that they should belong to the usufructuary, or he who enjoyed the use of the slave, in which case they will acquire the property therein. We likewise say, that notwithstanding a child be born of a slave, of whom one had the usufruct, while the mother was in the power of the usufructuary, such child will belong to the master of the slave, unless he had expressly agreed that the usufructuary should have it. And for this reason, that notwithstanding all the fruits produced by beasts or cattle, belong to those who have the usufruct of them ; yet

(1) C. art. 27, 29, 30 & 33. p. 116.—*ibid.* art. 41. p. 118—*ibid* art. 80. p. 126.

it is otherwise with the children of slaves : for as every thing was by nature given for the use of man, it would be neither proper nor just that he for whom the fruits of all things were intended, should himself be considered as a usufruct. (1)

LAW 24.

In how many ways the usufruct which one man has of the things of another, may be extinguished.

It is in the course of nature that every thing which man promise by word, or execute by deed, should cease to have effect, however firmly it may have been done. Since therefore we have shewn in the preceding laws, the manner in which a usufruct, as well as a simple use, may be established ; we will now speak of the manner in which they may be extinguished, or destroyed. And we say that if the grantee of a usufruct, or simple use, die, or be perpetually banished to some island ; or if he had been enfranchised, and afterwards fall again into slavery, for some crime he had committed ; or if being free, he had himself consented to be sold, as a slave, the usufruct or use which he enjoyed in any thing, would thereby be lost, and the thing itself would be restored to the original proprietor, and so it would be where neither the grantee, nor any person in his name, make use of the usufruct, or use, during ten years, while he was in the country, or twenty years while he was out of it ; he would then lose both by prescription, and the thing would be again restored to the original proprietor : we likewise say

(1) C. art. 12. p. 112.

that if the grantee sell to another, the right he had to the thing, both the use and usufruct would be thereby extinguished, and the thing will return to the original proprietor, so that neither the grantee nor his vendee can afterwards enjoy them. For though the grantee may lease to another, his right of usufruct of a thing; nevertheless he can not alienate that right. We likewise say that when he who has the right of usufruct in a thing, acquires the property in the thing itself; the usufruct is thereby extinguished, as the property and the usufruct of the thing, are united in the same person. (1)

LAW 25.

That the usufruct is extinguished when the thing upon which it was granted, is burnt, or otherwise destroyed,

If the house or building, upon which was granted the usufruct or use only, be entirely burnt, or wholly destroyed by an earth-quake, or in any other manner, the usufruct or use will be thereby extinguished. And notwithstanding the grantee may wish to re-build the house, or edifice upon the same ground, on which it before stood; he can not do it, unless with the consent of the owner of the property. (2)

LAW 26.

How long a usufruct endures which is granted to a city, or town, without mention of any specific time.

When the usufruct of a building, or an estate, or other thing belonging to another person, is granted to

(1) C. art. 59. & 60. p. 122.

(2) C. art. 56. & 57. p. 122.

a city, or town ; the usufruct will endure a hundred years, and no more, if no specific time had been stipulated in the grant ; after which it will revert to the owner of the estate, or his heirs. And the reason is, that a usufruct granted expressly to the commons of any place is extinguished by the death of all its inhabitants ; for the ancient sages have conceived that after the lapse of a hundred years, all those would be dead who were born at the time the usufruct was granted. And we also say, that the usufruct would expire, if the town, or place in favour of which it was granted, should be destroyed, so that the ground be cultivated on which it stood, or the place become a desert. Yet if all, or a part of the inhabitants of such place, afterwards establish themselves in another place, they will thereby preserve the usufruct, notwithstanding they had abandoned the soil of the town where they dwelt at the time they acquired the usufruct. (1)

LAW 27.

How long a grant of the right of habitation will endure.

Habitatio in latin, means *dwelling*, in common speech, and relates only to houses and other buildings. And we say that if one man confer on another, the right of dwelling in his house, either by grant, or last will, and no mention be made of the specific time such right is to endure, it shall be understood to endure during the life of the grantee or legatee. And the person enjoying the right of habitation, ought to make use of it, in good faith, by preserving, and not

(1) C. art. 55. p. 122.

deteriorating or destroying the building. He ought moreover to give good security to restore the house to the owner, or his heirs, after his death, or at the time agreed upon between the parties. And the grantee of such right may dwell in the house with his family ; or he may, if he choose, let, or hire it to others ; but only to such persons, as are good neighbours. And a man can not lose his right of habitation, unless by his death, or by abandoning it, without compulsion, during his life. (1)

TITLES,

Of the Roman Laws which relate to the title of **LAS SIETE PARTIDAS**, which treats of New Works.

Digest lib. 39. tit. 1. - - - - - *De operis novi nunciatione.*
 Code lib. 8. tit. 11. - - - - - *De novi operis nunciatione.*

OF NEW WORKS AND HOW THEIR ERECTION MAY BE PREVENTED.

What is meant by new works ; who may forbid their erection ; who may be forbidden, and in what manner, - - - - - **LAW 1**

How several persons engaged together in the construction of a new work, may be forbidden to continue the same ; or where several think they will be thereby aggrieved, - - - - - **2**

(1) *C. art.* 51. 64. 65. 66. 76. 78. & 79. *p.* 124. 126.

- Every person may forbid the erection of a house,
or other edifice in the public places, or threshing
grounds (*exidos*) of a town, - - - - - LAW 3
- That a man who has the usufruct of the thing of
another, may forbid any thing being done to it, 4
- That he who has a right of service upon the house
or estate of another, may forbid the erection of
any new works there, - - - - - 5
- That where any one is forbidden not to proceed in
the erection of a new work, and he afterwards
alienate it, he ought to inform the purchaser that
he had been so forbidden, - - - - - 6
- That no one can forbid a man from making new
works for the purpose of repairing, or cleaning
out the canals, or earthen troughs that are neces-
sary for the use of his houses, - - - - - 7
- What is the effect of forbidding the erection of a
new work, - - - - - 8
- What ought to be done by the judge when a suit is
brought before him, relative to forbidding the
erection of new works, - - - - - 9
- That either new, or old works which threaten to
fall, ought to be repaired or pulled down, - - - - - 10
- If the building of any one, fall upon the house of
another, before any complaint had been made of
it to the judge, the owner of the former, is not
bound to repair the damage caused thereby, - - - - - 11
- That walls or trees, may be pulled down, when any
one fears damage from them, in case they
should fall on his own walls, - - - - - 12
- That the troughs may be destroyed, which any one
has newly constructed in his house, to convey the
water thither, when his neighbors are thereby
prejudiced, as also the trenches by which the wa-
ter is prevented from running in its usual chan-

- nels upon their estates, - - - - - LAW 13
- For what reasons the owner of one estate which
does damage to another, is not bound to pay the
proprietor of the latter for such damage, - - - - - 14
- What he ought to do on whose estate the water is
stopped by stones, wood, or sand which it had
carried thither, - - - - - 15
- That the work erected to the prejudice of another
person, ought to be demolished, though both the
estate upon which it was erected and that which
was thereby prejudiced, should be afterwards
sold, - - - - - 16
- When many persons erect any new work which
causes damage to another, each of them may be
required to demolish it, - - - - - 17
- That one mill may be erected near another, provi-
ded the water be not thereby taken from the lat-
ter, nor impeded in its course, - - - - - 18
- That a man may make a new well, or fountain, in
his estate, - - - - - 19
- That castles, the walls of towns and other fortress-
es, as also their causeways, fountains, and ca-
nals, ought to be repaired and kept in order, - - - - - 20
- What penalty they deserve who commit any fraud
in the works which they are appointed to
oversee, - - - - - 21
- That a house or other building ought not to be
erected near the walls of towns or castles, - - - - - 22
- That no house or other building ought to be erect-
ed in the public places, or roads, or threshing
grounds of towns, - - - - - 23
- That houses, towers, and other buildings, ought
not to be erected near the church, - - - - - 24
- That every person is bound to repair, and keep in
order, his house, or any other building belong-

ing to him, but is not bound to build them anew,
 except in certain cases, - - - - - LAW 25
 That he who repairs a house, or other building
 which he owns in common with others, may re-
 cover from his co-proprietors, the expenses the
 repairs cost him, or he will acquire their part
 of the building, - - - - - 26

TITLE XXXII.

*Of New Works, and how their erection may be pre-
 vented: what is to be done where ancient works
 threaten to fall; and of all other kinds of works.*

LAW 1.

*What is meant by new works; who may forbid their erection;
 who may be forbidden, and in what manner.*

By new works (*lavor nueva*) is understood every sort of building newly erected and founded upon the ground, or begun anew, upon the foundation of an old wall or other edifice, by which the form and fashion it before had, is changed. And this may take place where one or more persons build, or add to, or take something from the ancient work, by which an alteration is produced therein. And any one who apprehends injury from such new works, may forbid and prevent them from being made. And so may his children, slaves, attorney or steward; or the guardians, or friends of minors, in their name. But they ought to give security that the persons in whose names they

interpose, shall ratify what they do. And the construction of such new works may be forbidden in three ways. The first, verbally ; where the person who forbids, says ; “ I summon you, such a one, to have
“ this work pulled down, and not to make it : and I
“ tell you it is a new work, built upon my ground and
“ against my rights, and I therefore prohibit you, from
“ working here for the future.”

The second, by taking a stone in his hand, and throwing it against the work, and uttering the same expressions, mentioned in the first case. The third is where the person wishing to forbid the construction of the new work, is afraid to go in person, to the place where it is building, because of the power of those who order it to be made. In that case he ought to present himself to the judge, and petition him to prohibit those who order, as well as those who execute the work, from doing it, as he is injured thereby. The judge ought then to go in person, or send some one, to tell them to desist, until the dispute can be decided by a judgement of court. And in whichever of these three ways, the construction of new works is forbidden, it ought to be done in the place where they are constructing. And if their construction be going on in several places, then it must be done in each of those places. And it will be sufficient to forbid the owner of the works, or those who oversee them, or the master workman and those who labour there, when none of the above mentioned persons be found on the place.

LAW 2.

How several persons engaged together in the construction of a new work, may be forbidden to erect the same : or where several persons think they will be thereby aggrieved.

Sometimes several persons commence jointly to erect a new work, and he who is aggrieved thereby, can not find them all together that he may forbid them from erecting it. In that case, we say it will be sufficient, if he speak to, and notify any one of them, in either of the ways mentioned in the preceding law, without saying any thing to the others, unless he choose. But if several persons think themselves aggrieved by such new work, and one only of them, forbid, in his own name, those who are engaged in it, from erecting it ; such forbidding will suffice for him only, and for no other person. But if he forbids one of them engaged in the building, in the name of all those who are aggrieved ; it will suffice for them all : and they ought to desist from their work, in the same manner as if they had been forbidden by each person aggrieved ; provided he who acts in their names, will give security that they will ratify what he does.

LAW 3.

Every person may forbid the erection of a house or other edifice in the public places, or threshing grounds (exidos) of a town.

If a man begin to erect a new edifice, in the public places, or street, or common threshing grounds (*exidos*) of any place, without the permission of the king, or of the council, upon whose ground he builds it : then any

one of the inhabitants may forbid him to continue the work ; unless the person forbidding be an orphan, a minor, of fourteen years of age, or a woman: for they can not do it, except where some new work is constructing upon their own property. (1)

LAW 4.

That a man who has the usufruct of the thing of another, may forbid any thing being done to it.

If a man have the usufruct of a field, garden, or other place belonging to another; and any body, but the owner begin to erect new works thereon, the usufructuary may forbid him from working there any more. And so may he who holds such field, garden. or other place, as a pledge, or by feudal tenure, or under a rent: and although he may so forbid a stranger, he can not the owner of the soil: yet he may demand of the latter to indemnify him for all the damage he sustained in his usufruct, by reason of the new works he had begun there; and the owner will be bound to do it.

LAW 5.

That he who has a right of service upon the house, or estate of another, may forbid the erection of any new works there.

The enjoyment of services is sometimes hindered by new works being erected upon the places from which they are due. We therefore say, if any one, to whom a service is due, from a house, or other edifice, feel himself aggrieved by the construction of new works

(1) R. ll. 7, 8 & 9. tit. 7. B. 7.

there, by which his service may be impeded ; he may forbid their erection, in the ways mentioned above. But if the service be such, as one estate may owe another ; as the use of a path, carriage road, or way, or an aqueduct : then the person to whom the service is due, can not forbid the construction of the new works erected in opposition to his service, in the manner we mentioned above. But he may complain to the judge of those who order the works to be made : and if the judge finds them wrongfully made, he may order them to be pulled down, and that the owner of the service receive the amount of the damages he had sustained on that account.

LAW 6.

That where any one is notified not to proceed in the erection of a new work, and he afterwards alienate it, he ought to inform the purchaser that he had been so notified.

If a man be forbidden in any of the ways above mentioned, to construct a new work, and he afterwards alienate the place upon which he was constructing it, to another person ; such forbidding will prejudice the purchaser, as well as the seller. The latter ought therefore to inform the purchaser that he had been forbidden to work there ; and if he does not, he will be bound to pay the purchaser, all the loss and damage he may sustain on that account. If, however, at the time of the sale, he give information of such forbidding to the purchaser, who nevertheless continued the work ; the latter must pay for all the damage arising therefrom, as it happened through his fault ; nor can he claim any indemnification, or amends, of the seller.

LAW 7.

That no one can forbid a man from making new works for the purpose of repairing or cleaning out the canals, or earthen troughs, that are necessary for the use of their houses.

When a man repairs, or cleans the canals, or aqueducts which receive the water from his houses, or estate, and his neighbour be aggrieved by the offensive smell caused thereby: or by stones, or bricks, or earth, or other thing necessary for the work, being thrown into the streets, or upon the ground of any person near the canal; or by stopping up the streets in uncovering the canal, with wood or otherwise, until the work be finished; yet no one can forbid or hinder him from executing such work: for it is for the benefit and convenience of houses and conducive to health, that the canals should be kept well cleaned and repaired. But they who do such works ought to take care to do them in such way, that when finished, the right of no person shall be impaired or injured thereby, in any manner, and that the place be left in the same situation it formerly was.

LAW 8.

What is the effect of forbidding the erection of a new work.

When the forbidding is made in any of the three ways above mentioned, it ought to be obeyed, whether made to the owner of the new work, to his overseers, or to a workman; so that the work ought not to be continued, unless by order of the judge of the place where it is making. For the forbidding has such force, whether made legally, or not, that if the person who

executes the work, be obstinate and unwilling to desist, after being forbid ; he ought to be compelled by the judge to pull down every thing he does thereafter, at the cost and expense of him who ordered the work to be made.

LAW 9.

What ought to be done by the judge, when a suit is brought before him relative to forbidding the erection of new works.

Men sometimes prohibit and prevent the erection of new works in one of the aforementioned ways, and afterwards both parties appear on that account before the judge. We therefore say that the judge ought to put the party forbidding under his oath, that he does not do it maliciously ; but because he believes he has a right to do it, as the works were erecting on his ground, (*en lo suyo*) or to his prejudice. And if he be unwilling to take the oath, the judge ought to permit the other to go on with the work he had begun, and to order the former not to molest him. But if he be willing to take the oath, the judge ought to receive it, and to hear what both parties have to say and prove : and in the mean time, the work ought to be suspended three months. And if the suit can not be determined in that time, the judge may grant to the party who had begun the work, the power to go on with it, taking from him good securities conditioned that should it appear he could not lawfully erect the work, because he had not a right to the place where he was erecting it ; that he would pull it down at his own expence : then the judge ought to grant him permis-

sion to go on with the work. We also say that if he wish to give such security before the expiration of the three months, the party forbidding the work, can not be compelled to take it. Yet if the latter does take the security before coming before the judge; or if without such security, he grant the other the power to go on with the work, after forbidding; the owner may then proceed with the work he had begun.

LAW 10

That both new and old works which threaten to fall, ought to be repaired or pulled down.

New works sometimes open and break, because they had been badly bounded, or feebly and unfaithfully constructed. Likewise ancient buildings decay, and threaten to fall, through age, so that the next neighbors are afraid of sustaining injury from them; In that case, we say, that the judge of the place may and ought to order the owners of such buildings, to repair or demolish them. And the better to do this, he should take with him master workmen, skilled in the art, and go to the place where the buildings are, which the neighbours are afraid will fall: and if he finds from the report of the workmen, that the buildings are in such bad condition that they can not be repaired, or that their owners are unwilling to repair them, and that they may easily fall and cause damage; he ought then to order the owners to pull them down. If, however, the workmen do not find them in such bad condition, the judge ought to compel the owners to repair them, and to give good security to the neighbours, that they shall suffer no damage thereby. And

if the owner be unwilling to give such security, or if he be contumacious by being unwilling to make the repairs ; the neighbors who complain against him, ought to be put into possession of the buildings which threaten to fall, and the property thereof given to them, if the owner continue obstinate, during the time in which he is commanded by the judge, to repair or pull them down. We likewise say, that if the owner of the building, give security to the neighbors who are in fear of it, that he will pay the damage they may suffer thereby ; and the building afterwards fall, through its own weakness, and not by accident ; he will then be bound to pay the damage for which he had obligated himself. But if the building be overthrown by an earthquake, lightning, heavy winds, an inundation, or by any other similar cause, he will not be bound to pay the damages done thereby. (1)

LAW 11.

If the building of any one fall upon the house of another, before any complaint had been made to the judge ; the owner of such building is not bound to repair the damage caused thereby.

If one man's building fall upon the house of another, before the latter had complained of it to the judge ; the owner will not be bound to pay for the damage, if any be caused thereby. Yet if the owner wish to take away the tiles, timbers and bricks which had fallen upon his neighbour's house or ground, and leave the rubbish and earth, he cannot do it. For he ought to

(1) C. art. 19. p. 130.

remove at his own expense and costs, every thing that had fallen ; or leave all for the benefit of him who had sustained the damage.

LAW 12.

That walls, or trees, may be pulled down, when any one fears damage from them, in case they should fall on his own walls.

Weak walls, and tall trees badly rooted in the ground, stand sometimes contiguous to other's estates and houses ; so that the neighbours are afraid, that if they fall, they may do them damage. We therefore say, that if a complaint of that nature be made to the judge, he ought to take with him good men, skilled in such matters, and see if the walls or trees were in such bad condition that they might soon fall and do damage ; and if they be found in such condition, he ought to have them cut, or pulled down.

LAW 13.

That the troughs may be destroyed, which any one has newly constructed in his house to convey the water thither, when his neighbours are thereby prejudiced ; as also the trenches by which the water is prevented from running in its usual channels, upon their estates.

Men sometimes erect strong works upon their own ground ; and though they may be such that the neighbours are not afraid of their falling, yet they may suffer some other damage, or inconvenience from them. As when any one builds a tower, or other edifice, and collects rain water there, by means of troughs which project so far out, that the water falls upon the roofs

of his neighbours houses. When therefore such, or any other like complaint, be laid before the judge ; we ordain that he cause the work to be so rectified and amended, that they who complain, shall not be prejudiced by them. We likewise say, that if a man make a wall, or an entrenchment, or put up palissadoes or any other work upon his own estate, in order to form a pond there, by which the water is diverted from its usual channel and injury is done to his neighbor's estate : or if he erect any work in the place where the water takes its rise, by which its course is changed, and it made to fall from so great a height, as to excavate holes and trenches in his neighbour's ground : or by which its course is impeded or stopped up so that they who were before accustomed to enjoy it, can not use it, to water their estates, as they usually had done : all these and the like works, newly erected, by which damage is done to the neighbouring estates, ought to be demolished, at the expense and cost of the person erecting them, and things restored to their former condition ; and he ought moreover to pay his neighbours, for all the damage he had thereby caused them. For as was said by the ancient sages, although a man has the power to do what he pleases, upon his own ground, yet he ought to do it in such a manner, as to cause no damage, or harm, to any other person. (1)

(1) *C. art. 15. p. 130.*

LAW 14.

For what reasons the owner of one estate, which does damage to another, is not bound to pay the proprietor of the latter, for such damage.

There are three ways in which a man may sustain damage from the estates of others, but which he is obliged to suffer, and can not lawfully complain of the owners of such estates. The first is that which is caused naturally ; as where one man has an estate situated below that of another. For though the water run from the higher estate, upon the lower ; or stones or earth be carried there, by the force of the waters, or in any other way, so that it is not done maliciously by the act of man, and do damage ; the owner of the higher estate is not culpable, nor is he bound to pay therefor. The second is that which is caused by works anciently made. For although the owner of the estate below suffer damage from the other upon which the works are ; yet, if ten years had elapsed, since the works had been erected, the owner of the estate sustaining the damage, being all that time in the place, and making no opposition : or twenty years, while he was absent and in another country, (*in otra parte ;*) he must then suffer the damage, and can not afterwards complain of it. The third is that which is caused by the service which one estate has upon another. For although the subjected estate receive damage by reason of the service for which it is bound, yet the owners cannot complain, on that account, of him to whose estate the service is due.

LAW 15.

What he ought to do, on whose estate the water is stopped by stones, wood, or sand which it had carried thither.

Where the water runs through the estates of several persons ; though none of them raise any works to impede its course, yet the stream itself, may do it naturally, by accumulating little by little, wood, mud, stones, and other things, so as to dam up the water and divert it, from the channel where it usually run.

If any neighbour be thereby aggrieved or suffer any loss, he may compel him upon whose estate the water is stopped up, to do one of two things either to clean out and open the place where the water formerly run and cause it to flow there as usual ; or to suffer the person aggrieved, to do it himself : and the owner of the estate will be obliged to do one or the other, though he should be unwilling. But if the place where water is accumulated, be a canal which belongs to many persons ; each of them, is bound to aid, in cleaning it out, along the limits of his estate, so that the water may run where it formerly did, that they may make use of it.

LAW 16.

That a work erected to the prejudice of another person, ought to be demolished, notwithstanding both the estate upon which it was erected, and that which was thereby prejudiced, should be afterwards sold.

When a man erects upon his estate, new works which detain or dam the water that ordinarily runs there, and which cause damage, or loss to the owner of a

neighbouring estate ; and the person receiving such damage, sell his estate to another, before he had required that the works should be demolished ; then we say, the purchaser may sue for the demolition of the works, unless the person erecting them, had acquired them by prescription. We also say, that if he who erected the works, sell the estate upon which they were erected, before he had been judicially demanded to pull them down ; the purchaser may be compelled to let them be demolished by those who sustain damage from them, or to demolish them himself : and he cannot excuse himself by saying, that he is not in fault, because he had not erected the works. But he may claim of the vendor, the amount of the damages (*mission*) done to his estate, by the demolition of the works ; and the vendor may be compelled to pay them, notwithstanding he should be unwilling to do so.

LAW 17.

When many persons erect any new work which causes damage to another, each of them may be required to demolish it.

If many persons erect any new work by which the water that any man had a right to use, is damed up or lost, he may require such persons, either separately, or jointly, as he chooses, to demolish the work they had constructed : though he can not demand reparation of any one of them separately, for the whole of the damages he had thereby sustained, but of each one, his proportional part only. We likewise say, that if the work had been erected to the prejudice of many persons, each or all of them, may require that it be demolished : nevertheless each one separately, can not

demand reparation for the whole of the damage or deterioration, though he may for his part only.

LAW 18.

That one mill may be erected near another, provided the water be not thereby taken from the latter, nor impeded in its course.

If a man have a water mill for making flour, or for fulling cloth; and any one desire to build another near it, on the same stream; he may do it, upon his own estate, or within the limits of the king's domain, with his consent, or with the consent of the common council of the place, where he wishes to build. But it ought to be built in such manner, as not to obstruct the current of water to the other mill, and to leave it to run freely, in its accustomed channel: If he builds in this manner, the owner of the other mill, can neither prohibit, nor trouble him, notwithstanding he should allege that his own produced less revenue, on account of the newly erected mill; and so it would be with respect to an oven (*forno*) which had been newly erected.

LAW 19.

That a man may make a new well, or fountain on his estate.

Where a man has a fountain, or well in his house, and his neighbour wishes to make one in his house likewise, in order to procure water for his use; the latter may do it, and the former cannot prevent him, notwithstanding the water in the first well, or fountain, may be thereby diminished: unless the person wishing to make the new well, has no need of it, and acts maliciously, with an intention of doing harm to the other, by stopping up, or diminishing the veins of

water that ran to his well or fountain. For then the latter may prevent him from making it ; or if he had already made it, he may compel him to destroy, or fill it up. For the sages have said, that neither the laws, or the king, should permit or overlook the wickedness of men, but ought always to repress it.

LAW 20.

That castles, the walls of towns and other fortresses, as also their causeways, fountains, and canals, ought to be repaired and kept in order.

The good order and dignity of the empire, require that its castles, the walls of towns and other fortresses, and causeways (*calçadas*,) bridges and canals of towns, should be maintained in such a state that they neither decay, nor fall to ruin ; and although they appertain to the good of all, yet the care and reparation of them, belong to the king. He ought therefore to appoint certain diligent men, skilfull in such works, to oversee them, and make the necessary repairs ; and he ought moreover, to furnish them with the requisite means for that purpose, but if it be necessary to erect any such works in cities or towns, which enjoy a separate revenue, such revenue ought to be first expended for that purpose. And if it be not sufficient ; or there be none ; then the inhabitants of the place, ought to pay in common, each in proportion to his estate, until a sum be raised, sufficient to erect the work : and no one, whether a military man, ecclesiastic, widow, or orphan, or any other person whatever, can be excused from paying their part, on account of any privilege they enjoy ; For since all are alike benefited by the works, it is but

just and right, that every one should contribute to them, as much as he is able. (1)

LAW 21.

What penalty they deserve, who commit fraud in the works, which they are appointed to oversee.

They who are appointed to oversee any works, ought to have them constructed, with great fidelity and diligence, so that there be no deception (*falsedad*) in them, through their fault, or neglect : and if they act otherwise, they will be responsible therefor, to the king, in both their persons and property. And if peradventure, any newly erected work fall, or totter before it is finished, or within fifteen years afterwards, the ancient sages ascribed the defect, to the fault, or fraud of those who were employed to construct it : and therefore they and their heirs are bound to rebuild it, at their own cost and expense ; unless it were destroyed by accident, (*occasion*,) as by an earthquake, or lightning, or by great inundations of rivers, of aqueducts, or other extraordinary accidents of a similar nature. (2)

LAW 22.

That a house or other building, ought not to be erected near the walls of a town or castle.

The roads near the walls of towns, cities and castles, ought to be left unobstructed and free : therefore no house or other building ought to be erected there, to

(1) *R. l. 18. tit. 6. B. 3—ib. ll. 2. & 3. tit. 5. B. 6.*

(2) *R. l. 3. tit. 11. B. 5—C. art. 71. p. 384,*

incumber them, or to lean against the walls. And if any one wish to erect a new house there, he ought to leave a space of fifteen feet, between the building and the wall. And the ancient sages thought this a wise measure, for two reasons: the first, that men may freely pass and guard the walls in time of war: the second, that no damage might arise to the town, or castle, from the proximity of the houses, or treachery be thereby practised. (1)

LAW 23.

That no house or other building ought to be erected in the public places, or roads, or threshing grounds of towns. (Exidos)

No one ought to erect a house, or other building or works, in the public places, or threshing grounds, (*exidos*), or roads which are common to cities, towns, or other places. For as they are left open for the sake of regularity (*apostura*), and the common good of all who come there, no one ought to take possession of them, or labour there for his own particular benefit. And if any one contravene this law, that which he builds there, ought to be pulled down and destroyed. And if the corporation of the place where the works are constructed, choose to retain them, for their own use, and not to pull them down, they may do so: and they may make use of the revenue they derive therefrom, in the same manner as of any other revenue they possess. And we moreover say, that no man who has erected works in any of the above mentioned places,

(1) *R. l. 1. tit. 7. B. 7.*

can, or ought to defend himself, by alleging that he had acquired them by prescription. (1)

LAW 24.

That houses, towers and other buildings, ought not to be erected near the church.

Men enjoy in common, the use of churches, there to pray God to pardon their sins: therefore neither houses, or shops, or other buildings, ought to be erected near them, as is prescribed with respect to the walls of castles and towns: and because moreover, a church is the holy house of God, and no shop of merchandize, or of other things should, be erected round about them, unless they relate to works of piety and grace (*merced*:) And if any building should be constructed there, it ought to be pulled down. We moreover say, that they who have the care of churches, ought to keep them in order and repair them, so that they neither decay, nor fall down.

LAW 25.

That every person is bound to repair and keep in order his house or any other building, belonging to him: but he is not bound to build them anew, except in certain cases.

When a man has a house, tower, or any other building whatever, in a town, or other populous place; he ought to keep it, in good order and repair, so that it does not fall, through his fault or neglect: but he is not bound to build it anew, if he does not choose; unless

(1) *R. l. 1. tit. 7. B. 7.*

he had agreed, or made a contract to build a house or tower, in any place, or had inherited the estate of any one who had ordered him to build one. For then he will be bound to comply with his contract, or the order of the testator. We likewise say, that any one who chooses, may build a new house or tower upon his own ground, provided he leave, as much space, on the side next the road, as is usually left by others, his neighbours in the place; and provided always, he does not raise it so high, as to discover much of what is doing in his neighbor's house.

LAW 26.

That he who repairs a house or other building which he owns in common, with others, may recover from his co-proprietors, the expences the repairs cost him, or he will acquire their part of the building.

If many persons own in common, a tower, house or other building which is in such a bad state of repair, as to threaten to fall; and if one of the co-proprietors cause work to be done upon it, or repair it, from his own resources, in his own name, or in the name of his co-proprietors, having first given them notice thereof; they will be bound, each for his part, to reimburse him the expenses he had incurred for the benefit of such building. And this they ought to do within four months from the day the work was finished, and payment had been demanded of them: and if they fail so to do, they will lose their part of the thing upon which the work was done, and it will remain free and entirely to him who had repaired it, at his expense.

But if he who made the repairs, had made them in bad faith, without giving any notice to his co-proprietors; repairing and doing work, upon the thing held in common between them, or making some new work there, in his own name, as if the whole belonged to him; in that case he ought to lose the expenses the work cost him; and the new work he had put there, will remain in common to all the co-proprietors.

END OF THE THIRD PARTIDA.

HERE COMMENCES
THE FOURTH PARTIDA,

WHICH TREATS OF
BETROTHING AND MARRIAGE,

TITLES,

Of the Roman and Spanish Laws, which relate to the
titles of **LAS SIETE PARTIDAS**, on Betrothing.

Digest lib. 23. tit. 1. - - - *De Sponsalibus.*

Code. lib. 5. tit. 1. - - - - *De Sponsalibus. &c.*

OF BETROTHING.

What ought to be the age of those who betroth
themselves. (a) - - - - - **LAW 6**

TITLE. I.

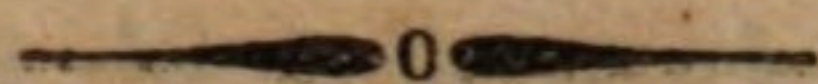
LAW 6.

What ought to be the age of those who betroth themselves.

But in order to contract marriage, the man must be
fourteen years of age, and the woman, twelve. And

(a) *This law being the only one of this title, which is translated, the
heads of the other laws are not given.*

if any persons intermarry before that time, it will not be a marriage, but a betrothing : unless they were so near that age, as to be in a condition to unite themselves carnally ; for then the knowledge and power of so uniting themselves, well supply the defect of age. (1)



TITLE, II.

Of the Roman and Spanish Laws, and of the civil code which relate to the title of LAS SIETE PARTIDAS, on Mariages.

Institutes lib. 1. tit. 10. - - - - - *De Nuptiis.*

Code lib. 5. tit. 4. - - - - - *De Nuptiis.*

Novel Coll. 4. tit. 1. - - - - - *De Nuptiis.*

Fuero Juzgo, b. 3. tit. 1. - - - - -

Fuero Real, b. 3. tit. 1. - - - - -

Ordenamiento Real, b. 5. tit. 1. - - - - -

Recopilacion de Castilla, b. 5. tit. 1. - - - - -

Civil Code, b. 1. tit. 4. - - - - -

OF MARRIAGES,

What marriage is, - - - - - LAW 1

Whence the word marriage is derived and why it
is called *Matrimonio* and not *Patrimonio* - - - 2

What advantages arise from marriage and what
good it produces, - - - - - 3

In what place marriage was established, when, by
what words and for what reasons, - - - - - 4

In what manner marriage ought to be contracted, 5

Who can intermarry and who can not, - - - - - 6

What force marriage has, - - - - - 7

(1) C. art. 6. p. 24.

When one of the spouses accuses the other of the sin of adultery, in what manner the accuser ought, or not to comply with the will of the other, pending the accusation, - - - - -	LAW 8
In what cases marriage forbids a man to sin, when he has connection with his wife, - - - - -	9
What are the causes which prevent marriage, - -	10
Of the condition called servile and of the solemn vow by which marriage is prevented, - - - - -	11
Of the spiritual and carnal relationship, and of the affinity which prevent and annul marriage, - - - - -	12
That they who commit the sin of incest, ought not to marry, - - - - -	13
What sins prevent men from marrying, - - - - -	14
That the different religions, or force, or fear hinder marriage from being contracted, - - - - -	15
What are the orders of religion which prevent and annul the marriage, - - - - -	16
What causes, prevent and hinder marriage, - - -	17
That one ought not to marry against the prohibition of the church, nor during holy days, - - -	18
Of those who commit adultery with married women and whether they can intermarry after the death of their husbands, - - - - -	19

LAW 1.

What Marriage is.

Marriage is the union of husband and wife, made with the intention of always living together and of never separating: each observing mutual fidelity towards the other; the husband having no commerce with any other woman, nor the wife with any other man, but both living as one (*ambosados*). Yet if the marriage were contracted by words *in presenti*, as we

observed in the title preceding the present, which spoke of betrothing; then there may exist reasons for which they may separate, notwithstanding we have above said they ought always to live together. For if either of them should wish to join a religious order, before they knew each other carnally, they may do so, although the other should oppose and after having so joined and professed religion, the other may marry, if he or she should think proper. But if the marriage had been consummated by a carnal connection between them, neither could afterwards enter or join any religious order if the other opposed it. (1)

LAW 2.

Whence the word matrimony is derived; and why it is called matrimonio and not patrimonio.

Matris and *munium* are latin words from which the term matrimony is derived, a term, which, in common speech, means *the office of mother*. And the reason why marriage is called *matrimonio* and not *patrimonio* is, because the mother suffers greater travail, on account of her children, than the father. For though the father begets them, the mother undergoes much sufferance, while she bears them in her womb, and very great pain when she brings them forth, and great labour after they are born, in nourishing them herself. And moreover because children, when they are small, have greater need of their mother's aid, than their father's. It is for all these reasons appertaining to the

(1) *R. ll. of the tit. 1 b. 5. C. art. 3. p. 24.*

mother, and not the father, that marriage is called *matrimonio* and not *patrimonio*.

LAW 3.

What advantages arise from marriage, and what good it produced.

Very great advantages and benefit accrue from marriage, according to what we have said in the prologue to this fourth *Partida*; and particularly these three things; faith, offspring and the sacrament. And faith, is the fidelity which the spouses ought to observe towards one another; the wife having no commerce with any other man, and the husband with any other woman. And the other benefit, offspring, is that of producing children, who may legitimately propagate the human species: it is with this intention that every one ought to marry, as well those who can, as those who can not have children. And the other benefit, the sacrament, is, that the spouses ought never to separate during life: for since God has joined them together, it is not fit that man should separate them. Moreover, love increases the more between husband and wife, when they know that they are not to separate: and they are then more certain of the parentage of their children, and therefore love them the more. Yet with all this, they may separate, if one of them commit the sin of adultery: or join any religious order, with the consent of the other, after they had known each other carnally. And notwithstanding they separate for one of these causes, no longer to live together, yet the marriage is not dissolved on that account.

LAW 4.

*In what place marriage was established, when, by what words
and for what reasons.*

(Not in force.)

LAW 5.

In what manner marriage ought to be contracted.

Consent alone, joined with the will to marry, constitutes marriage, between man and woman. And for this reason; because, notwithstanding the words necessary to constitute marriage, may be pronounced; yet if the will of those who utter them, do not agree with the words, the marriage will be without effect, and cannot be considered as real: although the church would determine it to be valid, if it should be proved, that these were pronounced in the manner, they ought to be, to contract marriage; and it were not proved that they had been pronounced in any other way, than with the intention to marry: as though pleasantry, or to shew by what words marriage might be contracted. Yet there are cases wherein marriage may be contracted without words, and by signs only; as by a dum person: for although he cannot contract it by words, he may by signs and consent: as the dumb, manifest their consent, as well by signs as they who speak, do, by words. And so it would be with the deaf, who hear nothing. And although we have above said that marriage can be contracted by consent alone; if they who contract it, can speak, it is proper they should express their consent by words, that it may be proved, if occasion require. And marriage may be contracted by the parties themselves

who intermarry, or by their relations, or messengers sent from their houses, or by strangers who do it by their orders. And it ought not to be contracted in secret, but openly, that it may be proved. (1)

LAW 6.

Who can intermarry, and who cannot.

Except those who are expressly prohibited by law, from marrying, all other persons may contract marriage, who are of sound understanding, so as to be able to consent to marry, and who labour under no impediment that prevents them from having commerce with women ; and although boys and girls who are not of age, pronounce the words by which marriage is contracted ; yet, as they have not the understanding to consent, the marriage contracted by such persons, is not valid. And so of an eunuch, or one deficient in any member necessary for generation : though they may have the understanding to consent, yet no marriage contracted by them, will be valid ; as they cannot unite themselves carnally with their wives, so as to beget children. Likewise a mad-man, or woman, whose madness never ceases, cannot consent to marry, notwithstanding they should utter the words necessary to contract marriage ; but if a person were mad only at times, and afterwards had lucid intervals ; if, during the time he was in his right mind, he consent to marry, the marriage will be valid.

(1) C. art. 5. p. 24.

LAW 7.

What force marriage has.

So great is the tie and force of marriage, that when legally contracted, it cannot be dissolved, notwithstanding one of the parties should turn heretic, or Jew, or Moor, or should commit adultery. Nevertheless, for any of these causes, they may be separated by a judgment of the church, so as to live no longer together, nor to have any carnal connection with one another, according to what is said in the title on the clergy, in the law which begins with the words *otorgandose algunos*. But if either of the married persons become blind, or deaf, or deformed (*contrecho*), or lose his limbs by pain or sickness; he ought not, for any of these causes, not even if he were affected with the leprosy, to be abandoned by the other, on account of the faith they promised to observe in marriage: but on the contrary, the one enjoying good health, ought to take care of the other and provide what was necessary for him to the best of his ability; But that which is above said, concerning the leprosy, must be so understood, that if the party free from that disease, should suffer great annoyance from the other, he may separate himself from the chamber and bed of the party affected, so as not to be, and cohabit continually together. But he ought to assist the leprous spouse in other things, & render conjugal duties when thereto required; unless such spouse lived in common with other lepers in the same house, and not in separate chambers. For then the healthy spouse will not be bound to live with the other in such a place, but out of it, he will be

obliged to serve her, as is above said: and if they have children together, such children ought to live with the healthy spouse, that they may not be exposed to the same malady, Moreover, whenever the husband and wife have had carnal connexion with one another, neither of them, can afterwards join any religious order, or make any other vow to preserve their chastity, against the wish of the other; but on the contrary, the husband will have power over the person of his wife in those things, and she in like manner, the same power over him. And when one of the married parties complains that the other refuses to have connexion with him, the party refusing may even be compelled thereto by the church: for in that case the church may force a compliance, though the parties had never had any commerce together; and notwithstanding one of them may have had connexion with the relation of the other, since they had been married. (1)

(No other part of this law in force.)

LAW 8.

When of the one spouses accuses the other of the sin of adultery, in what manner the accused ought, or ought not, to comply with the will of the other, pending the accusation.

(Not in force.)

LAW 9.

In what cases marriage prevents a man from sinning, when he has connexion with his wife.

(Not in force.)

(1) C. art. 1. & 2. p. 30.

LAW 10.

What are the causes that prevent marriage.

There are fifteen causes which hinder marriage from being contracted. The first is, when there is error in the persons intermarrying; the husband believing that they gave him one woman to wife, when they gave him another in her stead. And so it would be where the woman marries one man, when she believed she was marrying another: for in such case, there would be no consent on the part of him, or her who committed the error; therefore the marriage would not be valid; and if it had been contracted, it ought to be annulled; unless consented to anew, after the error had been discovered. And this is understood to apply where the woman believed she married a man with whom she had some acquaintance by sight; or from reputation, or report, and another person, whom she believes to be the same, comes and marries her. But if this were not the case, and she had no acquaintance with the man, and one person, under the name of another, comes and marries her; for such an error, the marriage could not be annulled: for then she would not have erred with respect to the person whom she did not know, but with respect only to the person who presented himself. And such an error would not be an error of person, for she saw him; but an error in another respect, which is called in latin, an error of rank, (*calidad*) or fortune: as if any one should call himself the son of the king, or of any nobleman, when he was not: or if he should say he was rich, when he was poor. And so the marriage would be valid when

a man married a woman, who said she was a virgin, when she was not. (1)

LAW 11.

Of the condition called servile, and of the solemn vow by which marriage is prevented.

The servile condition is the second cause which prohibits marriage. If therefore a free man marry a female slave, or the latter marry a freeman, not knowing of the slavery ; such marriage would not be valid : unless the spouse that is free, consent, by word or deed, after he is informed of his error, by ratifying the marriage, or by having carnal knowledge of the other. But if such marriage had been entered into, while the party who is free knew, before it was contracted, that the other was a slave ; then the marriage will be valid and cannot be annulled on that account. The third cause which prevents marriage, is the solemn vow which a person makes, on entering into religious orders as we have said in the title *de los Religiosos*, in the law which begins with the word *Solenne* : for such a vow prevents marriage, from being contracted, and ought to annul it, after it is contracted. But if the vow be simple, as we have said in the law which we mention in this ; though it may hinder marriage from being contracted, yet it ought not to be annulled, on that account; after it is once contracted.

LAW 12.

Of the spiritual and carnal relationship, and of the affinity which prevent and annul marriage.

Relationship, and affinity (*cunadia*,) as far as the

(1) C. art. 9 & 10. p. 24. & 26.

fourth degree, is the fourth cause which prevents marriages, from being contracted ; or which ought to annul it, when contracted.

(No other part of the law in force.) (a)

LAW 13.

That they who commit the sin of incest, ought not to marry.

(Not in force.)

LAW 14.

What sins prevent men from marrying.

(Not in force.)

LAW 15.

That different religions (desuaramiento de ley,) or force, or fear hinder marriage from being contracted.

The seventh cause which prevents marriage from being contracted, is force, or fear ; and by force, is meant, where any person is constrained against his will, or is imprisoned, or bound and made to consent to marry. And so we say that by fear, is meant, where it is exercised in such manner, as to make any man afraid, though he possessed great courage ; as if arms or other things be shewn him, with which they threatened to strike or kill him, or to do him some harm : or if any one who had been a slave and were enfranchised, should be threatened with being reduced back to a state of slavery : as where any person who had possession of his act (*carta*) of enfranchisement, should threaten him to burn or tear it, if he did not consent to the marriage : or if it be a virgin and she were threat-

(a) This law was, amended by the civil Code, art. 9. 10. 24. and 26.—

ened with ravishment, if she did not consent to marry. And the above mentioned causes, not only prevent marriage from being contracted; but any of them would be a reason, why it might be annulled, after it was contracted: unless the person who had been compelled to marry by force or fear, should become afterwards pleased, and ratify the marriage. (1)

LAW 16.

What are the orders of religion which prevent and annul marriage.

(Not in force)

LAW 17.

What causes prevent and hinder marriage.

Publicae honestatis justitia, means in common speech, the law that ought to be observed through deference to the church and to the people. This is the tenth cause which prevents marriage, from being contracted, and annuls it, when contracted. And affinity (*cunadia*,) as far as the fourth degree, is the eleventh cause which prevents marriage, and annuls it, when contracted, as we have said in the title concerning betrothing. The twelfth cause which hinders marriage and annuls it, when contracted, is where a man is of so frigid a nature, that he cannot have commerce with his wife. The thirteenth cause which prevents marriage and annuls it, when contracted, is where a madman marries, as we have said in this title, in the law commencing with the words, *casar pueden* (a) The four-

(1) C. art. 5. p. 24.

(a) l. 6. ante.

teenth cause which prevents and annuls marriage, is where they who intermarry, have not the age or understanding to give their mutual consent, nor are fit in member, or body, to unite themselves carnally.

LAW 18.

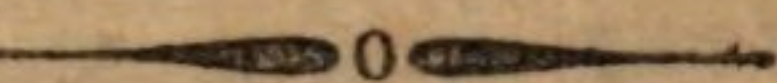
That one ought not to marry against the prohibition of the church, or during holy days.

(Not in force.)

LAW 19.

Of those who commit adultery with married women ; and whether they can intermarry, after the death of their husbands.

(Not in force.)



TITLES.

Of the Roman and Spanish Laws which relate to the title of LAS SIETE PARTIDAS, on the Conditions which men annex to their betrothings and marriages. (a)

OF THE CONDITIONS WHICH MEN ANNEX TO THEIR BETROTHINGS, AND MARRIAGES.

What is meant by Condition and in how many ways the term is applied, - - - - -	LAW 1
How many sorts of conditions there are, - - - - -	2
What are the conditions that suspend betrothings and marriages, - - - - -	3

(a) There is no title under this head in the Roman laws.

Of lawful conditions and in what manner they are stipulated, - - - - -	4
What are the conditions that annul marriages, - -	5
What are the conditions that are not valid though annexed to marriages, - - - - -a- - - -	6

TITLE III.

Of Clandestine betrothings and marriages. (h)

(Not in force.)

TITLE IV.

Of the conditions which men annex to their betrothings and marriages.

LAW 1.

What is meant by condition and in how many ways the term is applied.

By condition is meant an agreement or stipulation annexed to another agreement in these words : as if one man should say to another : “ I promise to give you, a hundred maravedis, if you will go to such a place for me.” And such is the nature of this condition, that if it be accomplished, it confirms the contract, to which it is annexed and if peradven-

(h) The laws of this title appears to be repealed by an act of the Legislature, concerning marriages, dated April 6th, 1807. Mart. Dig. vol. 3. p. 12.

ture, it should not be accomplished, the principal contract will not be valid. And therefore, until it be known with certainty, whether the condition will be accomplished, or not, the principal contract upon which it is founded, will remain suspended. The term condition, is applicable to three things : to the persons of men, to their estates, and to the promises they make with one another. It is applicable to persons, because there are men in a servile state, and others that are free. And so with respect to things ; for some things are in a servile condition, as those that are subject to a tribute ; or upon which men have some right to use them, though they belong to other persons. And there are others that are unincumbered, as those which each man has separately, and upon which no other person has any right of service. And with respect to promises, a condition is applicable as where one man says to another. "I promise to give you, a hundred maravedis if such a person goes to such a place" as is above said. (1)

LAW 2.

How many sorts of conditions there are.

Promises or donations are made in either of the four following ways : by mode, under condition, or for a certain cause, or by demonstration. By mode (*manera*,) as if any one should say to another, "I give you a hundred maravedis to make me a house." And by these words, "to make me a house," is understood a contract by mode, and not under condition;

(1) C. art. 66, p. 272.

that is for the specific thing expressed in the contract. By condition, as if one person should say to another, "I will give you a hundred maravedis, if you will go to Rome for me;" as is said in the next preceding law. For cause (*razon*,) which is called in Latin *causa* when one person says to another; "I will give you," or "I promise to give you, a hundred maravedis, for such a work, you have made for me, or service you have rendered me;" and these words are spoken in order to set forth especially the cause for which the donation or promise was made. By demonstration, when one person says to another; "I promise to give you a slave, whom I bought of such a person, mentioning him by name, who has such a trade; or designating him by some other certain token, and by uttering those words, "whom I bought of such a person;" or by saying, "such a one who has such a trade;" or by designating him by any other token: it is then understood that the contract is made by demonstration. And notwithstanding we said in the beginning of the law next preceding this, that condition was predicated of three things: this title will speak of the third species only; that of promises and their conditions: and as to the other species mentioned in this law, we shall treat of them at large, in the fifth Partida of this book, which speaks of the contracts and obligations which men enter into with one another.

LAW 3.

What are the conditions that suspend betrothings & marriages,

There are various distinctions to be made between the conditions which men affix to their betrothings or

marriages ; for there are some that are right and proper, and some that are not. And of those, which are right, there are some which depend upon the will of men, and others which are proper in every respect ; and among those that are not right and proper, are some which are contrary to betrothings and marriages, and which prevent them ; and there are others which do not. And those which are right and proper, and which men may stipulate at pleasure, are the following : as when a man says to a woman, “ I will intermarry with you, if you will give me a hundred maravedis, or such a castle, or other similar thing. And when such a condition is stipulated, it suspends the marriage, so that the man is not bound, nor can he be compelled to accomplish it, until the condition is complied with unless he should afterwards have carnal connexion with her, or should marry her by words *in presenti* : for in either of these cases, he will be obliged to marry her ; and if he should be unwilling, he may be compelled thereto. And this is called a licit (*honest*) condition, as it contains nothing of an evil tendency, or unbecoming. It is also called voluntary, because it is at the option of those who marry to stipulate it, or not.

LAW 4.

Of lawful conditions, and in what manner they are stipulated.

(Not in force.)

LAW 5.

What are the conditons that annul marriages.

Unlawful and improper conditions, are they that are directly opposed to the nature of marriages. As where a man in betrothing himself, or intermarrying with a

woman, should say, "I take you, as my wife, for one year from this time, or for any other time certain, and no longer ; or until I find another more rich or more respectable : " or if he should say, " I betroth or marry you, on condition that you will employ herbs or other means, to prevent yourself from having children : " or if he should say, that he would betroth, or marry her, on condition that she would prostitute herself to other men, and give him the price : neither the betrothing or marriage, to which such conditions are affixed, will be valid.

LAW 6.

What are the conditions that are not valid, though annexed to marriages.

There are other unlawful and base conditions, that are not contrary to the nature of marriage : as if any woman were to say to a man ; " I marry you, or I promise to marry you, if you will steal such a thing, or will kill such a man." There are other conditions which in Latin are called *impossibiles*, that is, which can not be performed. As if any man were to say to a woman, " I will marry you, if you will give me a mountain of gold, or will touch the heavens with your head." Such conditions as these, or others similar, are not valid, though they had been stipulated : and the betrothings or marriages to which they are affixed, will not be annulled, notwithstanding the condition should not be performed. (a)

(a) With respect to the conditions of contracts in general, see the Civil Code B. 3. tit. 3. chap. 4. p. 272.

TITLES,

Of the Roman and Spanish Laws, which relate to the title of LAS SIETE PARTIDAS, on the marriage of slaves.

Fuero Real. B. 4. tit. 11. (a)

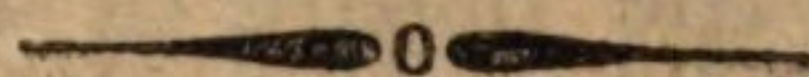
OF THE MARRIAGES OF SLAVES.

Whether slaves can marry, and with whom and whether it ought to be done with consent of their master. - - - - - LAW 1

In what manner a slave is bound, rather to obey the orders of his master, than those of his wife, with whom he had intermarried- - - - - 2

What rule ought to be observed with respect to marriages between a free person and a slave, - 3

Of those who intermarry with slaves believing them to be free, - - - - - 4



TITLE V.

OF THE MARRIAGE OF SLAVES.

LAW 1.

Whether slaves can marry, and with whom; and whether it ought to be done with the consent of their masters.

It has been, for a long time the usage, and the holy church have consented, that slaves should intermarry with one another. Likewise a slave may marry a free woman, and the marriage will be valid, if she knew, at the time she married him, that he was a slave : and so may a female slave marry a free man. But they

(a) There is no title in the Roman laws under this head.

must be christians, in order that the marriage may be valid. And slaves may intermarry, and their marriages will be valid, though opposed by their masters; nor can they be annulled on that account, if the spouses mutually consent, as is said in the title of marriages. Yet, notwithstanding, slaves still are bound to serve their masters as before. And if several persons own, in common, two slaves who intermarry together, and the owners should have to sell them; they ought to do it, in such way, as that the slaves may live together, and serve those who bought them: and not sell one of them in one country, and the other in another, so that they would have to live apart.

(No other part of this law in force.) (a) (1)

LAW 2.

In what manner a slave is bound rather to obey the orders of his wife with whom he had intermarried.

(Not in force.)

LAW 3.

What rule ought to be observed with respect to marriages between a free person and a slave.

(Not in force.)

LAW 4.

Of those who intermarry with slaves, believing them to be free.

Men are sometimes deceived in their marriages, believing that they marry free women who in truth, are

(a) Some of the provisions of this law, have been repealed by the Civil Code, p. 40. art. 13. and by the act concerning marriages, passed in 1807.

(1) R. l. 7. tit. 10. b. 8.

slaves. Wherefore, when any man intermarries with such a woman, not knowing that she was a slave, and she be afterwards enfranchised by her master; such marriage will not be valid, notwithstanding some may think it would become so, by the enfranchisement. And this chiefly on account of the error in the marriage; the man believing that he gave his consent to a free woman, when she was a slave. But if after he knew she was a slave, he should consent to the marriage, either by word or deed, the marriage would be valid, and the parties ought not to be separated. And where a free man had already married a slave, not knowing that she was such, and her master institutes a suit, claiming her as a slave; the husband, after he knows her condition, ought not then to have carnal commerce with her, though she were to request it. For if he have such commerce with her, after she was cast in the cause, he could not then withdraw from her, though she should be reduced again to slavery. And so it would be if she be free, and a suit were brought against her husband, claiming him as a slave. And if peradventure, the husband willingly return to a state of slavery, in order to separate himself from his wife, it will avail nothing, and the marriage ought not to be annulled on that account: but the wife may, on the contrary, reclaim him from slavery, if she choose. And this, because she has a right in his person, and because she sustains great dishonor thereby, and likewise her children, if any she have. And we shall hereafter shew, in the title concerning slaves, in what manner a free man becomes a slave.

TITLES

Of the Roman and Spanish laws which relate to the title of
LAS SIETE PARTIDAS, on relationship and affinity which
prevent marriage.

Digest lib. 38. tit. 10- - - - *De Gradibus and Affinibus
et Nominibus eorum*

Fuero Juzgo, B. 4. tit. 1. - - - - -

OF THE RELATIONSHIP AND AFFINITY
WHICH PREVENT MARRIAGE.

What is meant by natural relationship and whence the term is derived, - - - - -	LAW 1
What is meant by lineage from which relationship ascends or descends and how many sorts of line- age there are, - - - - -	2
What is meant by the degrees by which relation- ship is reckoned and how many kinds there are,	3
In what manner the degrees of relationship ought to be counted, and within what degree the parties can not be united in marriage, - - - - -	4
What is meant by affinity and within what degrees it prevents marriage, - - - - -	5
Of Moors or Jews, who, according to their religion, intermarry with their relations or allies, that it works no impediment, if they afterwards become christians. - - - - -	6

TITLE VI.

Of the relationship and affinity which prevent marriage.

LAW 1.

What is meant by natural relationship, and whence the term is derived.

Consanguinitas, in Latin, means, relationship, in common speech; which is the alliance or tie, existing between different persons, descended from the same root. This tie arises from the procreation produced by the union of man and woman. And it is predicated of different persons; for relationship can not exist in one person alone, but in several. It is likewise predicated of persons descended from the same root, in order to distinguish them from those who are connected by affinity. For though the latter are allied, no natural relationship exists between them: as they do not descend from the same root, as relations do; and he is called the *root*, from whom other men descend; as, for example, Adam, from whom sprung Cain and Abel his sons; and so from the latter, all the human race. And the term relationship, is derived from the two words, father and mother: for it is from the blood of them both, that children are born. And for that reason, relationship is called in latin *consanguinitas*, because it is by the union of the blood of father and mother, that their offspring is produced.

LAW 2.

What is meant by lineage (linea.) from which relationship ascends or descends : and how many sorts of lineage there are.

The line of relationship, is the established alliance between persons, connected with one another, like the links of a chain, descending from the same root, and forming different degrees between themselves. And as some may doubt, or not understand this series of degrees, unless it be exhibited to their sight, we think proper to cause a genealogical tree to be engraved, by which the matter will be fully illustrated, and place it in this book, that it may be the better understood ; (a) For men more easily understand what they see, than what they hear. And though, in the commencement of this law we explained what is meant by a line of relationship ; yet we wish it to be understood that there are three sorts. The first is the ascending line, as from father to grand-father, or great-grand-father ; and so on upwards. The second, the descending line, as from the father to the son, or grand-son, or great-grand-son ; and so on downwards. The other is the transverse line, which commences with brothers, from whom it descends by degrees, to their children and grand-children, and others descending from that line. For which reason it is called the transverse line, because they who compose its different degrees, do not descend from one another. (1)

[a] The difficulty of obtaining a suitable engraver, prevents the translators from annexing a representation of the genealogical tree, spoken of in the text.

(1) C. art. 14. p. 146.

LAW 3.

What is meant by the degrees by which relationship is reckoned ; and how many kinds there are.

Degrees of relationship, are reckoned in two ways. The one, according to the secular law : the other according to the rules established by the holy church. According to the secular law, a degree is the series of different persons connected by relationship with one another ; and from the manner in which they are separated, so is the degree by which they are removed from each other, reckoned, with respect to the root from which they spring. So by the secular law, the sons of him who is called the root, make the second degree, whether they be two, or more ; the grand-children, the fourth, and the great-grand-children, the sixth degree : and so always counting in the same way. And according to the other mode of computation established by holy church, a degree is a proper and continued series of persons, connected by relationship, who equally descend from the same root, in different lines. So according to the canonical law, the sons of him who is denominated the root, make the first degree, notwithstanding they descend in separate lines ; the grand-children make the second degree, and the great-grand-children the third ; the children of the latter the fourth, and so on. (a) And the reason why the secular and canonical laws reckon degrees of relationship in different ways, is, because the secular law calculates them in the manner only in which men inherit from one another, when they die intestate ;

(a) This law here speaks of the collateral line only.

and the canonical law counts them, with a view to regulate marriages. But the difference which exists in these two modes of calculating degrees, takes place only with respect to persons who have descended transversely, and not with respect to those who are related in the direct ascending or descending lines: for with respect to the latter, both laws agree. (1)

LAW 4.

In what manner the degrees of relationship ought to be counted: and within what degree, the parties can not be united in marriage.

The church enumerates and distinguishes four degrees of relationship, which ought to be counted as follows: in the direct ascending line, the father and mother are of the first degree; the grand-father and grand-mother, the second; the great-grand-father and great-grand-mother, the third; and the father and mother of the latter, the fourth degree. In the direct descending line, the son and daughter, form the first degree: the grand-son and grand-daughter the second: the great-grand-son and great-grand-daughter, the third; and the son and daughter of the latter, the fourth degree. In the transverse line, the brother and sister make the first degree; the children of the brother and sister, the second: the grand-children of the brother and sister, the third: and the great-grand-children of the brother and sister, the fourth degree. Now relations in the direct ascending and descending lines, however remote from one another, can not inter-

(1) C. art. 13, p. 146.

marry; but they may intermarry in the transverse line, beyond the fourth degree exclusively. (a)

LAW 5.

What is meant by affinity, and within what degrees it prevents marriage.

Affinitas in Latin, means in common speech, alliance (*cuñadez.*) And affinity is the alliance between persons, which arises from the union of man and woman: but it does not create any relationship. It arises exclusively from the union of man and woman, whether they be married, or not: for though any persons may be betrothed or married together, no affinity arises therefrom, unless they should unite themselves carnally. Anciently there were two kinds of affinity, which were established during a time: but at present the first only, is ordered to be observed by holy church; which is, where any man is united carnally with a woman, whether he had married her or not. For by such an union, all the relations of the woman, become allied with the man; and all the relations of the man become allied with the woman; each, in the degree, according to which he is related to either party. And from this affinity, there arises, if one of the parties so united, happen to die, an impediment which prevents the survivor from intermarrying with any relation

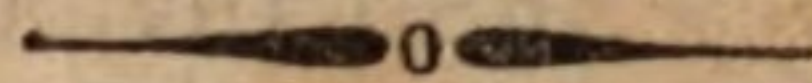
(a) This law was partly amended by the Civil Code art. 9 and 10, p. 24 and 26.

of the deceased, within the fourth degree exclusively, in the same manner as among relations themselves. (a)

LAW 6.

Of Moors or Jews, who, according to their religion, intermarry with their relations or allies, that it work no impediment if they afterwards become christians.

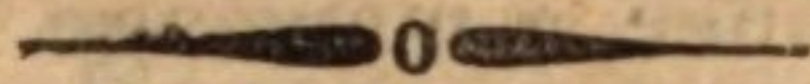
(Not in force.)



TITLE VII.

Of adoption and the relation of God-father &c. which prevent marriage.

[Not in force.]



(a) By the Civil Code art. 9 & 10. p. 24 & 26. marriage is prohibited between relations in the ascending and descending lines ; and also between brothers and sisters, uncles and nieces, aunts and nephews in the collateral lines. But as it does not mention *affinity*, as an impediment to marriage, it remains a question whether the Spanish laws in this respect are still in force. We are, however, inclined to think that affinity is not now an impediment, except in the direct ascending or descending lines, and that the Spanish law is to be considered rather as Canonical than civil, since by the dispensation of the pope, the brother-in-law may marry his sister-in-law, and *vice versa*.

TITLES.

Of the Roman and Spanish laws which relate to the title of
 LAS SIETE PARTIDAS, on men who cannot have com-
 merce with women and *vice versa*, on account of some
 personal impediment.

Novell. Coll. 4. tit. 1. ch. 6. *De impotentia.* [a]

OF MEN WHO CAN NOT HAVE COMMERCE WITH
 WOMEN & *VICE VERSA* ON ACCOUNT OF SOME
 LEGAL IMPEDIMENT.

What impediments prevent a man from having commerce with a woman,	LAW 1
How and when impotency forms an impediment to marriage,	2
What ought to be observed with regard to a woman who being too restricted for her first husband, is then separated from him and marries another,	3
That they who are castrated, cannot marry	4
How and in what manner a marriage ought to be dissolved, in certain cases of impotency,	5
In what manner the delay of three years for separat- ing those who marry persons affected by sorcery, is to be understood,	6
What is the difference between those affected by witchcraft and those of a naturally frigid con- stitution,	7

[a] There is no other title under that head, in the Roman laws.

TITLE VIII.

Of men who cannot have commerce with women, and of women who cannot have commerce with men, on account of some personal impediment.

LAW 1.

What impediments prevent a man from having commerce with woman, and how many sorts of such impediments there are.

Impotency of mind, or body, or of both, in man, is an infirmity or impediment which prevents him from having commerce with women. This impotency is of two kinds. The one, is that which arises from a natural defect, as where a man is of so cold a constitution, that he cannot so animate himself, as to have carnal connexion with a woman ; or when a woman is of a nature so restricted, (*su natura cerrada*,) that a man cannot have carnal connexion with her : or when the impediment arises from the want of age, as in children. The other, is that which arises from sorcery, or accident : as where any one is operated upon by witchcraft, or castrated by accident, or design. (a)

LAW 2.

How, and when, impotency forms an impediment to marriage.

Impotencia in Latin, means in common speech, a defect of power. And this defect of power to unite oneself with a woman carnally, and which prevents mar-

(a) Our laws do not recognize impotence produced by sorcery.

riage, is distinguished into two sorts; the one, that which endures for a time; and the other, that which is perpetual. That which is temporary, takes place among children, and prevents them from marrying, until they have the requisite ages. Yet they may betroth themselves, as we have said in the title which treats of betrothing. The other, which is permanent, is that which takes place among men who are naturally cold; or among women so restricted in their organs, (*tan estrechas*,) that neither by the aid of art, by which their lives are greatly endangered nor by the efforts of their husbands, can any carnal connexion be had with them. For such an impediment as this, the church may dissolve the marriage, if required by either of the parties; and ought then to give the other, that is not impotent, permission to marry again.

LAW 3.

What ought to be observed with regard to a woman who being too restricted, (estrecha) for her first husband; is then separated from him, and marries another. (a)

LAW 4.

That they who are castrated, cannot marry.

Castrated persons are they who have lost by accident, any of the organs necessary for generation. As

[a] As this law cannot be translated into English without offence to delicacy, the translators have contented themselves with giving its substance as expressed by Gregorio Lopez.

“Divortio facto ob mulieris arctationem, si carnaliter a secundo viro cognoscatur, restituenda erit primo viro; nisi ex utriusque viri inspectione membri pretendatur, primum nunquam eam, sine alterius adiutorio cogniturum

if any one leap upon a pale or post which pierce, or tare these organs : or if they be torn away by a bear, or boar, or dog ; or be cut off, or cut out, by any person ; or be lost in any other manner. Whoever therefore, has met with such an accident, cannot marry ; and if he should marry, the marriage would not be valid : because such a person can not render to his wife, the duties he is bound to perform. And after they are separated by the holy church, she may marry another man, if she choose. But if a man lose, by such accident, any of the aforementioned organs, after he had been married, or betrothed by words *de presenti*, the marriage will not be void, on that account, nor can either of the parties marry, during the life of the other, unless one of them had joined a religious order, before they had known each other carnally.

LAW 5.

How, and in what manner a marriage ought to be dissolved in certain cases of impotency.

(Not in force.) [a]

LAW 6.

In what manner the delay of 3 years, for separating those who marry persons affected by sorcery, is to be understood.

(Not in force.)

LAW 7.

What is the difference between those affected by witchcraft, and those who are of a naturally frigid constitution.

(Not in force)

[a] Alluding to the impotency caused by witchcraft.

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on ac-
cusations made either to prevent or dissolve marriages.

Novel Coll. 4. tit. 1. ch. 15, - - - - *Causae repudiorum*,
Civil Code b. 1, tit. 4. ch. 3 and 5. p. 26 and 28.

OF ACCUSATIONS MADE EITHER TO PRE-
VENT, OR DISSOLVE MARRIAGES.

Who can attack a marriage and for what reasons,	LAW 1
Before whom the accusation of adultery, ought to be made, and in what manner, - - - - -	2
For what impediments a marriage may be at- tacked and dissolved, - - - - -	3
Who they are that can not attack a marriage, - -	4
For what reasons they ought not to be heard who wish to bring accusations against a marriage, with a view to annul it, - - - - -	5
For what reasons the accusation of a person who wishes to attack a marriage, ought not to be heard, - - - - -	6
In what cases a married woman who has com- merce with another man, does not commit adul- tery, nor can be accused therefor, - - - - -	7
In what cases, women are excused, so that their husbands can not accuse them of adultery, - - -	8
In how many ways the accusation may be made, in order to separate the spouses, - - - - -	9
In what manner the wife may complain against the husband and the husband against the wife, in order to dissolve the marriage, on account of an impediment existing between them, - - - -	10

In what manner the libel of accusation ought to be made in order to dissolve the marriage, on account of any impediment, - - - - -	LAW 11
What a libel is, and how it is drawn up, when any one attacks the marriage <i>purely</i> and simply, in order to separate the spouses, on account of adultery, - - - - -	12
In what cases he who attacks a marriage, on account of adultery, ought, or ought not to obligate himself in the penalty of retaliation, - - -	13
That a defective libel ought not to be received, - - -	14
Who can be heard, as witness, with a view either to dissolve or prevent a marriage, - - -	15
In what manner they who demand the performance of a marriage, can or can not produce their relations as witnesses, - - - - -	16
In what manner the testimony of the relations of the parties who intermarry, may be received, - - -	17
That the effect of the betrothing entered into between the parties, may be easily prevented by the testimony of their relations, - - - - -	18
Who the witnesses ought to be, that testify for the dissolution of a marriage, and in what manner they ought to be sworn, - - - - -	19
That they who testify from hearsay ought not to be belived, - - - - -	20

TITLE IX.

Of accusations made either to prevent or dissolve marriages. (a)

[a] The Spanish law called accusation, any complaint made to dissolve marriages or to obtain separation from bed and board, on account of adultery, even when the complaint was made by civil suit

LAW 1.

Who can attack (accuse) the marriage, and for what reasons

The wife may accuse the husband, or the husband the wife, in order to obtain a dissolution of the marriage, if the impediment existing between them, be such as not to proceed from any fault in either of them. As if the man be of such a frigid nature ; or the wife so restricted in her organs (*tan estrecha*,) that the husband cannot have carnal commerce with her : or where either of them is affected by sorcery. For none but the married parties themselves, can accuse each other, on account of such impediments. But if they choose to be silent, concerning their impediments, and to live together, not as man and wife, having carnal commerce with each other, but as brother and sister ; they may do so. And so it would be, where a free person married a slave, without knowing it. For no other person can accuse them, on account of such impediment, but the parties themselves. And the accusation made for any of these causes, is not so properly an accusation, as a complaint or demand. For those against whom it is made, are not guilty of any sin which has given rise to the impediment ; since it arises from the sorcery of others ; or from accident, or error, where one of the parties believed he was marrying a free person, when in truth it was a slave. (1)

(1) C. art. 13. & 14. p. 26.

LAW 2.

Before whom the accusation of adultery, ought to be made, and in what manner.

Husband and wife may accuse each other, in another way, than those mentioned in the preceding law ; and that is for adultery. And if the accusation be made with a view to separate the parties from living together, or from having any commerce with each other ; no other person but the spouses themselves, can make an accusation for such a cause : and it ought to be made before the bishop or the ecclesiastic judge (*official*) either by the parties themselves, or their attorneys. And every man who knows that his wife commits adultery is bound to accuse her of it, if he thinks she will not renounce, but persevere in that sin, and if he does not accuse her, he will himself, sin mortally. But if he thinks she will desist from that sin, and do penance for it, then if he does not wish to accuse her, he will not commit a sin. And the holy church have even thought fit, that where a man has been separated from his wife, on account of adultery, so that they do not live together, the husband may afterwards pardon her, if he choose, and they can then live together and know each other carnally, as though they had never been separated. But if the husband choose to accuse her, in order to inflict upon her, the penalty of the secular laws : he may then accuse her before the secular judge. And if peradventure the husband should not choose to accuse her ; and she should not wish to desist from her wicked practices : then the accusation may be brought against her, by her nearest relations : and if these do not wish to do it,

then by any other person whatever. For the holy church think proper, to permit every person to accuse a woman who commits such a sin. For, as all persons are prohibited from committing the sin of adultery ; so he who commits it, sins against the right which belongs to all. And in all the various ways in which the husband can accuse the wife, mentioned in these two laws ; the wife may in like manner, according to holy church. accuse him, if she choose ; and she ought to be heard, as he is himself. (1)

LAW 3.

For what impediments a marriage may be attacked and dissolved.

If there exists between the spouses, any carnal relationship or affinity as far as the fourth degree ; or a spiritual relationship, as that of God-father or God-mother (*compadradgo* ;) or any of those impediments which ought to have prevented the marriage, or for which it ought to be dissolved, if already contracted, on account of the mortal sin arising therefrom : then each of the parties may accuse the other, touching such impediment, in order to dissolve the marriage. And if they be silent in this respect, wishing to live together in sin, then their relations may accuse them ; and if the latter do not choose to do it ; then it may be done by any other person whatever, for the reason mentioned in the law preceding this (2)

(1) See the laws of the tit. 2. Book 8. of the *Recopilacion* and C. art. 2. p. 30.

(2) C. art. 17, p. 26.

LAW 4.

Who they are that cannot attack a marriage.

Neither a person who is infamous, so that his testimonies cannot be received, or who had been guilty of a mortal sin, or who can be proved to be affected with it, can accuse others, in order to annul the marriage existing between them : unless it belongs rather to them to do it, on account of their relationship, than to other persons, and because they are more affected by the sin in which the spouses live ; nor can any one attack the marriage, or be heard on that account, who does it only with a view to obtain something of those whom he accuses : nor ought he to be heard who had received money from the spouses, in order to attack the marriage : for if these facts be proved, then the accusation of none of these persons, ought to be allowed.

LAW 5.

For what reasons they ought not to be heard, who wish to bring accusations against a marriage, with a view to annul it.

When the intention of persons to intermarry, is publicly announced in any church ; and the priest advertise those who are present, that if they know of any impediment why the parties should not marry, they must make it known by a day which he indicates. If then any person present, when this declaration is made, remain silent, notwithstanding he knew of such impediment ; and he should afterwards wish to accuse the parties after they are married, in order to dissolve the marriage, he ought not to be heard. And

so it would be, if such person were not present at the time the priest made the publication ; for if he had been informed by others of what had been said in church, and he remained silent, knowing of some impediment existing between the parties, he cannot be heard to accuse them after marriage : unless he can assign some just cause why he could not hear the proclamation, when it was made ; as if he were deaf at the time ; or were not of age ; or if he had heard, or been informed of it, in some other way, and were so infirm that he could not rise and make known the impediment existing between the spouses ; or if he were so distant from the place, that though he had heard of the publication, yet he could not arrive before the parties had married ; or if he were silent at the time, through fear, that he could not prove the existence of the impediment, and had discovered the proof after the marriage ; or if he had abstained because another had commenced the accusation, alledging that there existed an impediment which prevented them from intermarrying, and such person, before he had proved it, desisted therefrom, at the request of the parties, or on account of something they had given him. And so it would be, if any one declare, that at the time the publication was made, and before the marriage was contracted, he did not know of the impediment of which he wished to accuse the parties, notwithstanding he were present at the publication : but that he had since been informed of the existence of such impediment : such person ought to be made to swear to the truth of what he says, and that he does not do it maliciously ; then he ought to be heard. And they can not

decline hearing him, notwithstanding he may have been apprised of the impediment of which he wished to accuse the parties by some person who was present at the time of the publication, but who was silent, and did not wish to accuse the parties. Any of the above persons who can establish any excuse of this nature, ought to be heard, after the marriage is contracted.

LAW 6.

For what reasons the accusation of a person who wishes to attack a marriage, ought not to be heard.

If a man who has committed adultery, should wish to accuse his wife or any other woman of the same sin ; she may defend herself, by saying that she wished to shew that her accuser had been guilty of the same offense : and if she accordingly prove it, he ought not to be heard, according to the canon law. Likewise, when a man accuses his wife of adultery, and she alleges that she wishes to prove that he had pardoned her offense, and had since received her, as his wife ; if she prove this, the husband ought not to be heard : nor ought the accusation to be heard of him who himself delivered up his wife to the adulterer, or who was their messenger, or who had received a price for the adultery she had committed with another ; nor ought he to be heard, who, knowing that a woman had been guilty of adultery marries her after the death of her husband & then wishes to accuse her of that offense : or if after he married her, he knew that she had committed adultery, and he had consented to it, by being silent, or by concealing it.

LAW 7.

In what case a married woman, who has commerce with another man than her husband, does not commit adultery, nor can be accused therefor.

If a man have commere, by force, with a married woman, violently seizing her, so that she cannot defend herself: in that case, she does not commit adultery, nor can she be accused therefor. Nor can a woman be accused of adultery, who has connexion with a man whom she believes to be her husband. As when the husband, from any cause whatever, should rise from the bed of his wife in the night; and then another person, who was in the same house, should lie with her, and she should receive him, believing him to be her husband. For if such person have commerce with her, in this manner, she cannot be accused of adultery; unless she, in some way, knew of the intrigue; or had acted maliciously, consenting to have commerce with the person, after she knew that he was not her husband.

LAW 8.

In what cases women are excused, so that their husbands cannot accuse them of adultery.

If a married man depart from his country to go in the army, or on a pilgrimage, or to any other country distant from his own, and should stay away so long that any one should induce his wife to believe that he was dead, or had married another woman: if in that case, she should marry again, she could not be accused of adultery, notwithstanding her first husband were living; for her ignorance would excuse her. But if after she had married the second husband, she should

be informed with certainty that the first was living ; and she should nevertheless continue with the second and have carnal commerce with him : if this fact be proved, she may be accused.

(No other part of this law in force.)

LAW 9.

In how many ways the accusation may be made, in order to separate the spouses.

An accusation brought to separate the spouses, may be made in two ways : either simply in the nature of a plaint, or demand, according to what is said in the second law of this title ; or otherwise by criminal accusation, the party making it, obligating himself under a penalty, according as is commanded by the secular law. And the accusation which is made purely and simply, is divided into two kinds : either on account of such an impediment as will dissolve the marriage for ever, as that of relationship between the parties, or for any other impediment for which the marriage ought to be dissolved ; or on account of an impediment for which the parties ought to be separated only, so that they do not live together, or have any carnal commerce ; as for the sin of adultery. And we will shew how the accusation ought to be made in each of these ways, and for each of these impediments. (1)

(1) See the Civil Code b. 1. tit. 4. ch. 3 & 5. p. 28.—Ibid. tit. 5 ch. 1. p. 30.

LAW 10.

In what manner the wife may complain against the husband, and the husband against the wife, in order to dissolve the marriage, on account of an impediment existing between them.

If a woman have cause of complaint against her husband on account of his frigidity or his being impeded (*ligado*); she ought to express herself in writing, or verbally, by complaining simply in the following manner, before any of the canonical judges, calling him by name: "That she complains of her husband that he can not have commerce with her and that she prays the marriage may be dissolved and that she may have permission to marry another man, as she wishes to have children." And as we have above said, this demand ought to be made purely and simply; because the party making it, is not bound to insert in the petition, the year, month, or day, as in other libels (*libellos*) of accusation. And in this manner the husband also, may complain of his wife, if she have any impediment which prevents him from having commerce with her.

LAW 11.

In what manner the libel of accusation ought to be made, in order to dissolve the marriage on account of any impediment.

(Not in force.)

LAW 12.

What a libel is, and how it is drawn up, when any one attacks the marriage, purely and simply, in order to separate the spouses on account of adultery.

(Not in force) (a)

(a) This and the preceding laws, relate to the form only of the petition, containing the allegations upon which the prayer for a separation is founded.

LAW 13.

In what cases he who attacks a marriage on account of adultery, ought, or ought not to obligate himself in the penalty of retaliation (del talion.)

(Not in force.)

LAW 14.

That a defective libel ought not to be received.

When the libel, which any one prefers in order to accuse a woman of adultery, whether the accusation be made to obtain a separation from bed and board, or to inflict the penalty of the secular laws, is badly formed, such libel ought not to be received, nor ought she to be found guilty upon such accusation. But if the libel be afterwards amended and correctly made, according to the laws of this title: it ought then to be received, and the accusation heard. Also if there are many accusers who attack the marriage, they ought not all to be heard: but they ought to select one among themselves, whom they think fit, to bring the accusation; and he ought to present the libel, and be heard, and no other: and if he be cast, no other person ought to be heard concerning the same act of adultery. Likewise, no one can make an accusation for adultery, in order to inflict the penalty of the secular laws, by sending letters to that effect, but he must appear himself before the judge, to make the accusation, and present his libel for that purpose, as is above said.

LAW 15.

Who can be heard as witnesses with a view either to dissolve or prevent a marriage.

Every man of good character may be a witness on an accusation made, in order to dissolve a marriage, on account of relationship or affinity between the parties, as far as the fourth degree. And as many have doubted whether relations can be witnesses in such cases, the holy church have thought proper to explain this matter, and ordain, that if the wife accuse the husband, or the husband the wife, alledging that they are related or connected by affinity within the above mentioned fourth degree ; then both the relations of husband and wife may be heard, with a view to dissolve the marriage. And it is thought best to hear such witnesses in preference to all others ; for they know more of the relationship than any other persons, and endeavour as much as they can, to inform themselves of their genealogy. So likewise, they ought to be heard in preference to all other witnesses, in order to dissolve such a marriage, when the accusation is made by a relation of the spouses, or by any other person whatever. And what we have said in this law, ought to be observed with regard to marriages already formed ; the same in like manner ought to be observed with regard to persons who wish to intermarry, when any one declares that there exists between them such an impediment as is above mentioned. (a)

[a] By the Civil Code, relations of either party, in the collateral line, as far as the fourth degree inclusively, are competent witnesses ; but that circumstance may affect their credibility. C. art. 249. p. 312.

LAW 16.

In what manner they who demand the performance of a marriage, can, or cannot produce their relations as witnesses.

When a woman denies in court, that she had agreed to marry the man who demands her in marriage ; if he can prove the agreement, he may produce as witnesses both his and her relations ; or the latter only, or any other person of good fame. But if he who claims her for wife, be not of a lineage so rich, honorable, powerful, or respectable, as herself, he can not produce his relations as witnesses : for they, it may be presumed, will wish to augment the honor and fortune of their relation. But if the parties be equal in these things, the man may then produce as witnesses, both his relations with hers, or with strangers. And if a woman bring suit, claiming any man for her husband, and he deny that he is such, she may produce testimony in the same manner.

LAW 17.

In what manner the testimony of the relations of the parties who wish to intermarry, may be received.

When the intention of the parties to intermarry, is publicly announced, as is said in the fifth law of this title : if any one then alledge that there exists between them the impediment of relationship, which ought to prevent them from marrying ; in that case, the testimony of the relations of the parties themselves may be heard. And if they testify that the parties are not relations so as to hinder the marriage ; counting the degree of relationship existing between them, and swearing to the truth

of it : their testimony ought to have effect, and the marriage ought to take place. But if after the marriage is contracted, any one should wish to attack it, on account of the relationship of the parties, and such relationship be proved by persons not related to the parties ; the marriage ought to be dissolved, unless the same relations themselves who bore testimony at the time the intended marriage was announced, or others of the same lineage, testify again when the accusation is made, that such impediment did not exist between the parties ; for if they testify in this manner, not varying from what they said before ; and if they be of greater number and more worthy of belief than they who said to the contrary ; or of an equal number and equally worthy of belief ; then the testimony of the relations should prevail, and not that of the others, and the marriage ought not to be dissolved. And the reason that the witnesses may be a second time produced upon the same matter in which they testified before, is, because the nature of the demand is changed. For in the first instance, they testified concerning the publication of the marriage, and the second time concerning the accusation made against it.

LAW 18.

That the effect of the betrothings entered into between the parties, may be easily prevented by the testimony of their relations.

The effect of the betrothings, entered into between the parties, by words *de futuro*, may be easily prevented, if not contracted under oath. For if the father or mother of the parties betrothed, or any of their near

relations declare ; or if it be reported in the place, that there exists between them, an impediment which ought to prevent them from intermarrying ; then the marriage ought not to be celebrated ; and this because the holy church have thought proper, that in such a case, the testimony of a single man or woman, or the common report of the place, were sufficient to prevent the marriage. But if such betrothings were entered into and confirmed under oath, then no part of the above testimony, would be reputed worthy of belief. But the testimony of one of those persons, united to that of the other, together with common notoriety, would be sufficient. But if the marriage be already contracted, it ought not to be dissolved, unless he who attacks the marriage, prove the existence of the impediment, by such, and such a number of witnesses, as are requisite to prove the fact. And what is said in this law shews that it is an established rule, that many things may prevent the contracting of a marriage, which cannot dissolve it, after it is contracted.

LAW 19.

Who the witnesses ought to be, that testify for the dissolution of a marriage, and in what manner they ought to be sworn.

The witnesses admitted to testify for the dissolution of a marriage existing between any persons, on account of any impediment whatever, ought to be free from any mortal sin and all evil suspicion. And before they testify, they ought to be sworn by the judge upon the holy evangelists ; or between his hands, if he be a bishop or priest, in the following manner, “ You do swear to God, and to saint Mary, and to me,

“ upon these holy evangelists, that you will speak the
“ truth concerning what you know, whether from see-
“ ing, or having heard it yourselves from your ances-
“ tors, or other, relative to the relationship, or any other
“ impediment, which is said to exist between such a
“ man and such a woman, (mentioning them by name)
“ and for which impediment they wish to dissolve the
“ marriage between them: and that you will not with-
“ hold the truth, neither through love, hatred, nor any
“ gift you have received, or expect to receive, nor
“ through fear, or any other cause whatever; and that
“ what you may declare in this respect, you shall be-
“ lieve to be so.” And the witnesses ought to an-
swer that “ so they do swear;” and then the judge
ought to say, “ that if they do so, may God help them;
and if not, that he may confound them;” to which
they ought to answer “ amen.” (a)

LAW 20.

That they who testify from hearsay, ought not to be believed.

The witnesses being sworn in the manner mentioned in the preceding law; if the impediment concerning which they are to testify, in order to dissolve the marriage, be that of relationship, and the witnesses declare that what they testify is from hearsay; they ought not to be believed, nor will their testimony have any effect, unless they say that they had seen and known, some of the persons of the degrees enumerated, and from whom, it is said, were descended the spouses,

(a) We have translated this law, leaving it to the proper tribunals to determine whether it is in force or not.

the dissolution of whose marriage is in question. They must also state the names of the persons whom they say, they had seen and known; and that they designate expressly, the degree of relationship existing between them, and the spouses intended to be separated. And there is another reason why the testimony of him who speaks from hearsay, ought not to be heard. For if he says that he heard it from one man only, and no more, he ought not to be believed; notwithstanding he should say, he had heard it before the suit was begun: nor should his testimony be received, although he should say he had heard it from several persons after the suit was begun, and that he did not know it before; for it may be suspected that he had been tampered with, or induced to testify at the request of one of the parties: And so it would be if he declare that he had heard it, from persons of ill report, or enemies, or evil wishers to the parties, or from those, who, if they were present themselves, would not be permitted to testify.

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
separation and divorces,

Digest lib. 24. tit. 2. . . . *De Divortiis et repudiis.*

Code lib. 5. tit. 24. . . . *Divortio Facto, Apud quem li-
beri morari vel educari de-
beant.*

Fuero Juzgo b. 3. tit. 6. . . .

Partida 4. tit. 19. l. 3. . . .

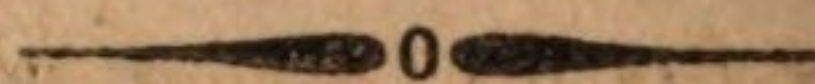
Civil Code, b. 1. tit. 5. . . .

OF SEPARATION AND DIVORCES.

What is meant by divorce, and whence the term
is derived. - - - - - LAW 1

In what cases divorces between men and women
may be made. (a) - - - - - 2

For what reasons a suit for the dissolution of a
marriage, ought not to be submitted to arbitra-
tors. - - - - - 8



TITLE X.

Of separation and divorces.

LAW 1.

What is meant by divorce, and whence the term is derived.

Divortium in latin, means in common speech, separa-
tion, (*departimiento*.) And is the means by which the

(a) The subsequent laws of the title as far as the 8th not having
been translated, their heads are omitted.

wife is separated from the husband, and the husband from the wife, on account of some impediment existing between them, when it is properly proved in court. And whoever separates the parties in any other way, doing it by force, or contrary to law, will go against that which is said by Jesus Christ, in the Gospel: "those whom God has joined together, let no man put asunder." But when the spouses are separated by law, it is not then considered that man separates them; but the written law, and the impediment existing between them. And *divortio*, takes its name from the separation of the wills of man and woman, which are in a contrary state when separated, to what they were when the parties were united.

LAW 2.

In what cases a divorce, (departimiento) between man and woman may be made.

[Not in force.] (a)

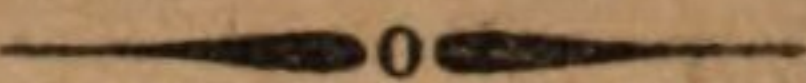
LAW 8.

For what reasons a suit for the dissolution of a marriage, ought not to be submitted to arbitrators.

By *Arbitri* in Latin is meant, persons to whom the parties agree, under a penalty, to submit any cause, to be by them decided, as they think proper. And the holy Church prohibit suits for separation or divorce, from being put into the hands of arbitrators, though they should be priests, laymen or bishops. And this,

[a] The subsequent laws of this title, as far as the 8th, speak of the causes for which divorces may be granted; but not being in force, they are not translated.

for two reasons. First, because every suit put into the hands of arbitrators, cannot be finished but by means of a penalty which ought not to be stipulated in a suit concerning marriage : for marriage ought to be free and not embarrassed by any restraint, and therefore, arbitrators cannot decide such causes. The second reason is, because marriage is spiritual, and was first established by our Lord, as is said in the title concerning marriages : Such a cause, cannot therefore be determined by any other persons, except by those who hold the place of our Lord Jesus Christ in the Church, and who have power to do it. (1)



TITLES.

Of the Roman and Spanish laws, and of the Civil Code which relate to the title of LAS SIETE PARTIDAS, on Dowry and Donations, *propter nuptias*.

Digest lib. 23. tit. 3. - - - - *De Jure Dotium.*

Digest lib. 23. tit. 4. - - - - *De Pactis Dotium.*

Digest lib. 23. tit. 5. - - - - *De Fundo Dotali.*

Digest lib. 24. tit 1. - - - - *De Donationibus inter virum
et uxorem.*

Digest lib. 33. tit. 4. - - - - *De dote praelegata.*

Digest lib. 37. tit. 7. - - - - *De dotis Collatione.*

Code lib. 5. tit. 3. - - - - *De donationibus ante nupti-
as, vel propter nuptias et
sponsalitiis.*

Code lib. 5. tit. 16. - - - - *De donationibus inter virum
et uxorem.*

Code lib 5. tit. 15. - - - - *De dote cauta non numerata.*

(1) C. art. 6. p. 30;

- Code lib. 5. tit. 11. - - - - - *De dotis promissione et nuda pollicitatione.*
 Novel. coll. 8. tit. 1. - - - - - *De tempore non solutae super dote.*
 Novell coll. 7. tit. 9. - - - - - *De aequalitate dotis propter nuptias donationis &c.*
 Civil Code B. 3. tit. 5. ch. 2. sect. 2.

OF DOWRY AND DONATIONS *ARRAS*.

- What is meant by dowry and donation *Arras*,
 and at what time they can be made and stipu-
 lated. - - - - - LAW 1
 How many kinds of dowry and donations *Arras*
 there are. - - - - - 2
 Of the donations which the husband makes to the
 wife, and the wife to the husband, such as jewels
 and other things. - - - - - 3
 What donations made between husband and wife,
 after marriage, are not valid and how they may
 be rescinded. - - - - - 4
 In what cases the donations which husband and
 wife reciprocally make to one another, are valid, 5
 Of what things husband and wife may mutually
 make presents to one another, notwithstanding
 the marriage was already contracted, - - - - - 6
 That the dowry and donations made, on account of
 marriage, ought to remain in the power of the
 husband, to be by him preserved and adminis-
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 Who ought to give the dowry, - - - - - 8
 Who can or can not be compelled to endow women,
 when they give them in marriage, - - - - - 9
 In how many ways dowry may be given, - - - - - 10
 That a dowry may be given simply with, or
 without condition, - - - - - 11

That they who give a dowry, ought to fix a time when they are to give it, - - - - -	LAW 12
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What things may be given in dowry, - - - - -	14
That the wife may give in dowry to her husband, that which is due her, - - - - -	15
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When the things given in dowry have been ameli- orated or deteriorated who ought to enjoy the profit, or pay for the loss, - - - - -	18
When the damage sustained by the things given in dowry, must be supported by the wife, and not the husband, - - - - -	19
On whose account is the profit or loss on slaves given in dowry, when they increase or decrease in value, or die, - - - - -	20
Of cattle given in dowry, and of the other things which may be counted, weighed, or measured: to whom belongs the profit, or who sustains the loss arising from them, - - - - -	21
Who runs the risk of the dowry when it is lost by a judgment in court, - - - - -	22
In what cases the husband acquires a dowry giv- en to him by his wife; or the donation made to her by her husband, on account of the mar- riage, - - - - -	23
What ought to be observed when the parties in- termarry in one country, having entered into an agreement there, and then go to live in ano-	

ther country where a custom prevails contrary to their agreement, - - - - -	LAW 24
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How the fruits of the dowry ought to be divided, when the marriage is dissolved by a judgment of court, - - - - -	26
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Of the fruits which the husband gathers from the dowry before marriage, - - - - -	28
Whether the wife can, during marriage, demand the dowry which she had given to her husband,	29
To whom the dowry ought to be given, when the wife dies, - - - - -	30
At what time the dowry ought to be delivered to the heirs of the wife, - - - - -	31
What expenses the husband may claim and recov- er when he delivers the dowry to his wife, or to her heirs, whenever the marriage is dissolved by a judgment of court, or by death, - - - -	32

TITLE XI.

Of Dowry, and of Donations, (Arras.) (a)

LAW 1.

*What is meant by dowry and donation, (Arras ;) and at what
time they can be made and stipulated.*

That which the wife gives the husband, on account
of marriage, is called dowry. It is a sort of donation

[a] See the Laws of tit. 2. b. 5. of the Recopilacion.

made with a view to her maintenance, and to the support of the marriage ; and according to what is said by the ancient sages, it is as it were, the patrimony of the wife. And that which the husband gives the wife, on account of marriage, is called in Latin, *donatio propter nuptias*, which means, a donation which the man gives the woman, on account of his marriage with her : and which in Spanish, is properly called *arras*. But according to the laws of the ancient sages, this word has another acceptation ; for it means a sort of pledge given in surety of a promise to marry. And if the marriage happen not to be accomplished, the pledge will belong to the party who kept the promise he had made, and will be lost by him who had not kept his. For altho' the penalty which had been annexed to a promise to marry, could not be enforced ; yet a pledge, or earnest money, or covenant which had been stipulated in this respect, ought to have effect. And it was anciently a custom to give pledges, where a promise had been made to marry. But the dowry, or donations, which the husband gives or makes to his wife, or the wife to the husband, as is above said, may be given or made before, or after the marriage is contracted. And they ought to be made on equal terms ; unless a contrary custom had for a long time prevailed in the place. And if after the marriage had been contracted, the husband should wish to increase the donation he had made to his wife, or she the dowry she had brought to him ; they may do it, on equal terms, as is above said. (a)

(a) R. l. 1. tit. 2. B. 5. C art. 15, p. 226 & art. 219, p. 256.

LAW 2.

How many kinds of dowry, donations, and arras there are.

There are two sorts of dowry, called in Latin, *Adventitia* and *profectitia*. By the *adventitia* is meant, the dowry which the wife gives to the husband out of her own effects; or which is given for her, by her mother, or by any other relation, not of the direct ascending or descending lines; as her uncle, cousin or other relation, or by a stranger. And it is called *adventitia*, because it comes from the gains made by the wife herself, or of donations made her of other property than that which belonged to her father, grandfather, or her other relations, in the ascending, or descending lines. And the other species of dowry is called *Profectitia*; and it is so called because it proceeds from the property of the father, or grandfather of the wife; or from some other person, from whom she descended in the direct line. But if the father owe any thing to his daughter, and by her order give it to her husband, as a dowry: notwithstanding such dowry be paid by the father, out of his own estate, yet it will not on that account, be called *profectitia*, but *adventitia*; because he did not give it as the father, but as a stranger. And so it would be, if any person give a thing to the father which the latter gave to his daughter: for though the father give it to her husband, it will not be *profectitia*, but *adventitia*. And we also say there are two kinds of donations, or arras. The one is that which the husband gives to his wife, on account of the dowry he receives from her, as is above said. The other is that which the husband

gives the wife gratuitously, and which is called in Latin *sponsalitia largitas* ; that is, a gift on betrothing her, and which is made before the marriage is concluded by words *in presenti*. There is another kind of donaton which the husband makes to the wife, and the wife to the husband, after the marriage; this kind of donation is prohibited by law. And the nature of each of these donations, will be explained in the laws of this title. (1)

LAW 3.

Of the donations which the husband makes to the wife and the wife to the husband, such as jewels and other things.

Sponsalitia largitas, in Latin, means in common speech, a gift which the husband makes to the wife, or the wife to the husband, freely and without condition, before the marriage is concluded by words *de presenti*. And though such gift be made, without condition, yet it is always understood that the party receiving it, is bound to restore it, if by his or her fault, the marriage should not be contracted. But if the marriage happen not to be accomplished, because of the death of one of the parties : in that case, a distinction must be made. For if the spouse who had made the gift, die before he had given the conjugal kiss (*besasse la esposa*,) then the thing given ought to be restored to the heirs of the deceased. But if he had given her the conjugal kiss, then half only of the gift ought to be restored, and the other half ought to

(1) *R. ll.* 1. & 2. *tit.* 2. *b.* 5. *C. art.* 5. 15. *p.* 326. & *art.* 219, 222 & 223. *p.* 256.

remain to the other spouse. But if it happen that the woman had made a gift to the man, a thing that seldom happens, as women are naturally more selfish and avaricious than men, (a) and she die before the marriage had been accomplished ; in that case, whether she had received the conjugal kiss, or not, the thing given ought to return to her heirs. And the reason why the ancient sages have been induced to make this difference between these gifts, is, because the female spouse gives the kiss to her betrothed husband, and is not presumed to receive it from him. And also, because when he receives the kiss, he derives pleasure and joy therefrom, while she remains embarrassed with shame. (1)

LAW 4.

What donations made between husband and wife after marriage, are not valid ; and how they may be rescinded.

Husbands often make donations to their wives, and wives to their husbands, during marriage, not as marriage gifts, but through the affection they have for one another. And such donations are prohibited, in order that the parties may not be prejudiced thereby, and dispossess themselves of their property, through their mutual affection : and also, because the one that was the most avaricious, would be in a better condition than the other who gave freely. And if they do make any such gifts after marriage, they will not be

(a) This unhandsome compliment to the sex, is founded upon §. 1. l. 33. lib. 24. tit. 1. of the pandects, where the reflection is still more illiberal.

(1) *R. II. 1. 2 & 4. tit. 2. b. 5.*

valid, if one of the parties become thereby poorer, and the other richer ; unless he who made the donation, did not revoke or annul it, during his life ; for then it would remain v^álid. But if the party who made the donation revoke it during his life, by expressly saying ; “ I do not wish that such a donation which I made to my wife, should be valid : ” Or if he observe silence in this respect, and afterwards give or sell the same thing to another person : or if the party receiving the donation, die before the party who made it ; in either of these cases, the first donation will become void. (1)

LAW 5.

In what cases the donations which husband and wife reciprocally make to one another, are not valid.

There are cases and circumstances in which, donations made by the husband to the wife, or by the wife to the husband, during marriage, are valid. And this may take place in two ways. The one is where the donor does not thereby become poorer, nor the donee richer ; as if any man or woman institute a married man his or her heir, saying thus ; “ I institute for my heir, such a person, (designating him by name) and I order, that when he dies, the estate which I give him, shall go to his spouse.” For if the husband of such spouse, before he enters upon the possession of the estate, give it to his wife, the donation would be valid. And the reason is, that he would not be the poorer on that account, as he had not yet been in pos-

[1] C. art. 224, p. 258.

session of the estate, and the patrimony he possessed before, would not be thereby diminished. And so also it would be where any person had bequeathed by will, any thing to the husband; such as a house, vineyard, or an estate, in the manner above mentioned; and afterwards the husband should give it to his wife, before he had been in possession of it. And so it would be, where the husband gave any thing to the wife which did not belong to him; for such donation would be so far valid, as to enable the wife, to acquire the thing by prescription. And so would all donations, similar to these, made between husband and wife, be valid.

LAW. 6.

Of what things husband and wife may mutually make presents to one another, notwithstanding the marriage was already contracted.

The second manner mentioned in the preceding law, in which the donations mutually made between husband and wife, during marriage, would be valid, is where the donor becomes poorer thereby, without the donee becoming richer. As if one of the spouses should say to the other, that he gives to her the place of his intended sepulture, or that he should give, or buy for her another place for the same purpose; or that he would give her an estate to build a church, or monastery upon; or that he would give her the rents of an estate, or a sum of money, or other thing to serve to illuminate a church. These and other such like donations, will be valid, because the donee would derive

no benefit therefrom, during her life ; and because moreover they are given, so as to turn, in a manner, to the service of God.

LAW 7.

That the dowry and donations made on account of marriage, ought to remain in the power of the husband, to be by him preserved and administered.

The husband ought to put the wife in possession of the donation he makes to her ; and so the wife ought to put him into possession of the dowry which she gives to him. And though they put each other into possession, yet the husband ought to remain master, and have controul of the whole, and receive the fruits in general, as well of that which the wife had given, as of that which he had given himself, for the maintenance of himself, his wife and family, as well as for the proper support of the marriage. Nevertheless, the husband can not sell, alienate or dissipate, during marriage, either the estate he had given his wife, or the dowry he had received from her ; unless she had given it to him, at a fixed price. And this rule ought to be observed for this reason ; that if the marriage comes to be dissolved, each of the spouses may then retain their own, free and unincumbered, to do with it whatever she or he might think proper ; or that it may descend to their heirs, if the marriage be dissolved by death. (1)

(1) C. art. 28, 33, 34 & 36, p. 328 *ibid.* art. 90, p. 342.

LAW 8.

Who ought to give the dowry.

Dowry may be settled in many ways : for it may be constituted voluntarily ; as where the wife herself, or any other person in her name, gives it to the husband. There are other persons who may be compelled to give a dowry, against their wishes ; as the father, when he marries his daughter whom he has under his power. For whether she have any thing or not, of her own, or which she derived from another person, the father is bound to marry and endow her. Likewise the paternal grandfather who has his grand daughter under his power, is bound to endow her when he gives her in marriage, though he should not wish it ; provided she had not wherewith of her own, to furnish the dowry. But if she possess wherewith to give the dowry, then the grand-father is not bound to endow her, of his own goods, if he does not choose to do so ; but he ought to endow her out of her own effects. And so it would be with the great-grand-father who had his great-grand-daughter under his power. (1)

LAW 9.

Who can or can not be compelled to endow women, when they give them in marriage.

Though the mother may of her accord, endow her daughter, if she choose, yet she can not be compelled to do it, though the father may be compelled thereto, as was said in the law next preceding this. But if the

(1) R. l. 8, tit. 9, B. 5. C. art. 47, p. 52.

mother be a heretic, Jewess, or Moor, she may be compelled to endow her christian daughter. Also, if any person have a young woman, under his care or power, together with her estate, and she be of an age proper to marry ; such person may be compelled to give her in marriage and to endow her, according to her estate, and the condition (*nobleza*) of the man she marries : for if she be endowed in a greater sum than she possessed, it would not be valid : and if any of the above persons mentioned in this and the preceding laws, prohibit any one, under their power, from marrying, when they desire to do so, and are of the requisite age : or if they maliciously oppose the marriage, in order to detain those under their power, as well as their property, for their own use ; such persons ought to be compelled by the judge of the place, to give the party in marriage and to endow her, according to what is above said. (1)

LAW 10.

In how many ways, dowry may be given.

By stipulation in Latin, is meant a promise. This is another way in which a dowry may be constituted. As if a man say to the woman he marries : “ do you promise to give me in dowry, such a vineyard belonging to you, or such an estate, or such a sum of money which such a one is to give you ; and she answer, “ I promise,” in this manner, or by such words, a dowry is constituted by stipulation. And so a dowry may be constituted in another way called in Latin *policitatio* ;

(1) R. l. 8 tit. 9, b. 5. C. art. 47, p. 52.

which means a simple promise made with the donation; as if the wife should say to the husband, "I promise you in dowry, this sum of money, or this house, or this vineyard," (or any other thing which he gives) "and I give it to you from this moment." And a dowry may be still constituted in another way, when the wife says, that she promises to give her husband something in dowry (mentioning it by name) and that she will deliver it to him, or to some other person, in his name: and in such case, though she gave it to another person, the husband is considered as receiving it; and he will consequently be responsible to her for it, if necessary. (a)

LAW 11.

That a dowry may be given simply with or without condition.

A dowry may be constituted purely and simply, or under condition. It is understood to be purely and simply constituted, when the wife says to the husband, or to another person in his name, that she promises, or covenants to give him a hundred maravedis, as a dowry, or other thing, expressly calling it by name. It is constituted conditionally, when the wife, or another person for her, says to the husband, that she promises or covenants to give something in dowry, if the marriage should be accomplished. And this condition is always understood, whether it be expressed or not. (1)

(a) See the laws of the tit. 2. b. 5. of the Recopilacion.

(1) R. see the laws of the title 2. b. 5. of the Recopilacion, *Ibid.* l. 2. tit. 16. B. 5.

LAW 12.

That they who are to give a dowry, ought to fix a time when it is to be given.

They who agree to give a dowry, may fix a day, or time certain, at which they will give it; or they may agree to give it, at an indeterminate time. And a day certain may be fixed, where he who promises to give the dowry says, that he agrees to give it, on a certain day, expressly naming what day. And so it would be a time certain, if he should say, that he promises to give it, in the year in which he makes the promise: and then it is understood that the year begins to run from the day on which the marriage is celebrated, and not before, notwithstanding the agreement had been prior to that day. And the time would not be certain, when a woman or any person for her, should say, "I promise to give you when I die, one hundred maravedis, as a dowry." Here a distinction must be made; for if the wife constitute a dowry, in favor of her husband in this way, it would not be valid, because it would be a promise to give a dowry, at a time when the marriage no longer existed, and when the husband could not profit thereby. But if any other person constitute a dowry, by saying thus: "I promise to give you as a dowry, on account of your wife, so many maravedis, at my death:" such a promise would be valid. For it may happen that he who promises, may die, at a time when the marriage yet existed between those to whom he made the promise. (1)

(1) R. l. 8. tit. 9. b. 5—Ibld l. 2. tit. 16. B. 5.

LAW 13.

That dowry may be constituted by delivery (dar de mano,) without promise, or any fixed time.

Tradere in Latin, signifies in common speech, to give: and this is another manner in which dowry may be constituted. This would be the case where the wife, or any person for her, give immediately from the hand, to the husband, or to another person in his name, any thing, by way of dowry, whether moveable, or immoveable, not by promising, or agreeing, in any other way, to give it; but by actually giving it to him with the hand, or by putting him in possession of it. And what we here say, with respect to the wife, giving the dowry to another person, in the name of her husband, is understood, under condition that he ratifies it: For if, in that case, the husband should not ratify it, and the dowry be lost, the loss must be sustained by the wife, and not by the husband. And dowry may still be established in another way; as if the husband, being indebted to the wife, should say: "Do you agree to give me, in dowry, so many maravedis, or such a thing, which I am bound to give you?" and she answer, "I consent, and agree to consider the same as paid, as though I had actually received it." And so it would be if the husband were indebted to any other person, who should acquit him of the debt, in the manner above mentioned, giving it, as a dowry, to the woman whom he had married; for then the debt will remain to the husband, as the dowry of the wife.

LAW 14.

What things may be given in dowry.

Dowry may be assigned or settled, as well of things called immoveable, as moveable, of whatever nature they may be. Nevertheless, if the wife wish to give her husband, a dowry of immoveable things, and she be a minor under twenty-five years of age, she cannot do it of herself, though she have a curator, unless she inform the judge of the place, that he may approve it. But if she wish to give a dowry of moveable things, she may do it, with the consent of the curator, who has charge of her person and property, and she will not be obliged to apply to the judge of the place. (1)

LAW 15.

That the wife may give in dowry to her husband, that which is due her.

If any one owe a debt to a woman, who desires to marry, she may require the debtor to give in dowry to her husband, what he owes her. And this is understood, where the debtor acknowledges the debt, and promises the husband, to pay it to him. And this is another mode of constituting a dowry, which in Latin is called *delegatio*. But here a distinction must be made; for if the debtor be the father, grand-father, or great-grand-father, although the husband be negligent, and should not compel either of these persons to pay the debt, the risk of the dowry will not, however, be on

(1) R. 1. 2. tit. 16. b. 5. and see the laws of the tit. 2. b. 5. Ibid—C art. 223. p. 256 and 258.

his account, notwithstanding he who owed the debt, should afterwards become so poor, that he had not wherewith to pay it; but it will be, on account of the wife. For, if in such case, the wife should wish to claim the dowry of her husband, during his life, or of his heir, after his death, because the husband had not thought proper to constrain any of the above mentioned persons to pay it, by a judgement of court; she ought not to be heard, in as much as the children and sons-in-law, ought not to use constraint against their fathers and fathers-in-law, in the same manner they do against strangers. But if the wife had given to her husband, in dowry, a debt due her from any other person than one of the above mentioned relations, then the following distinction may arise: for the debt may be forced or voluntary. If it be forced, as if it be due for something which she had sold, or lent to the debtor; or for any other cause for which he can be compelled to pay, and the husband neglect to demand the debt of the debtor, while the latter had the means of paying, and he become afterwards so poor, that he cannot pay it: in this case, the risk will be on account of the husband, and he, or his heirs, will be responsible to the wife, for her dowry, when the marriage comes to be dissolved. But if the debt be voluntary; as if any one, of his own accord, and without compulsion, had promised any thing to the wife, whether moveable or immoveable: then, a distinction may again be made in this wise: for either a thing certain is promised, or a thing uncertain. And if it be a thing certain, and the wife say to the husband: "I give you, in dowry, so many maravedis, which such a person

owes me, and I order him to pay them to you," and the debtor promise to pay them, with certainty: if then the husband should not demand the payment of such a dowry, as this, while the debtor had wherewith to pay, and he should afterwards become poor, the risk will be on account of the husband, and he will be bound to pay the dowry, to the wife, if the marriage should be dissolved. But, if it be a thing uncertain; as if the wife should say to the husband; "I give you in dowry, one hundred maravedis which such a person has bequeathed me, and I order them to be paid to you;" and the debtor should then say to the husband, "I will give you what I owe to your wife," not saying with certainty, how much; then the risk of losing the dowry, will be for the wife and not for the husband, although he should be negligent in demanding it. For, although in that case, the wife should claim payment of such a debt, the debtor will not be bound to give her more than he can. (1)

LAW 16.

What dowries may be appraised at the time they are given; and if there should be any fraud in the estimation, how the same may be annulled.

A dowry may be settled, with or without an appraisement of its value, at the time it is constituted. And it would be appraised, when he who gave it should say: "I give you such a house, or such a vine-

[1] See the laws of the tit. 2. b. 5. Recopilacion—Ibib 1. 2. tit. 16. b. 2. C. art. 48. p. 330.

yard in marriage, and I appraise it at one hundred maravedis. It would not be appraised where he who gave it, should say simply, "I give you such a house or such a vineyard in dowry." And where the dowry is appraised, as is above said, and it is estimated at more or less than its value: if either of the parties be injured thereby, then both the party who gives, as well as the party who receives the dowry, may require to be relieved against the deception. And this rule is understood, as applying to dowry alone; for in whatever manner the deception may happen in estimating the thing above or below its value, the party who is aggrieved thereby, may always be relieved on shewing the deception (*engaño*). But this rule does not apply to other contracts: for he who causes the deception, is not bound to repair the injury, unless it amount to more than half the just price of the thing; such would be the case where any one sold a thing worth twenty maravedis, for forty-one: or for nineteen, when it was worth forty. (1)

LAW 17.

Of the estate which the wife possesses separately, and which is not given in dowry, and which is called in Latin paraphernalia.

By *paraferna* is meant in Greek, all the estate and things, whether moveable or immoveable, which the wife retains separately, and which are not comprehended in the dowry. (a) And it takes its name from *para*, which in Greek means *near*, or *besides*, and *ferna*

[1] R. l. 1. tit. 11. b. 5—C. art. 33 and 34. p. 328.

(a) Mart. Rep. vol. 3, p. 455—ibid vol. 4, p. 14.

dowry, which in common speech signifies every thing joined to, or brought besides, or extra the dowry. And if all those things called in Greek *paraferna*, be given by the wife to the husband, with the intention that he should have dominion over them, during the marriage; then he will have it in the same manner he has over the things which she gives in dowry. But if she does not give them to him, expressly, and if it was not her intention that he should have dominion over them (*señoris en ellas*); then they will always remain under the controul of the wife. And so it would be where it was doubtful whether she had given them to her husband, or not. And all those things called *paraferna*, enjoy the same privilege, as the dowry itself: for in the same manner that the estate of the husband is bound to the wife, where he alienates or dissipates her dowry; so likewise is it bound for her *parafernalía*, into whatever hands, his estate may pass. And though the obligation upon his estate, should not be stipulated in words, yet it is understood as arising from the act itself. For immediately the husband receives the dowry, or other things called *paraferna*, all his estate becomes bound to his wife; as well that which he then has, as all that which he shall have thereafter.

(1)

LAW 18.

When the things given in dowry have been ameliorated or deteriorated, who ought to enjoy the profit, or pay for the loss.

The dowry, or arras, may be ameliorated or deteriorated. Wherefore, we will here shew to whom the

(1) C. art. 58, 59, 60, and 62. p. 334.

profit or loss will, in that case, appertain. And we say, that if the dowry which the wife gave to her husband, had been appraised, in the manner above mentioned ; and it be afterwards ameliorated or deteriorated, the profit or loss will be for the husband ; unless the amelioration or deterioration happened before the celebration of the marriage : for then the profit or loss would be for the wife. And the reason is, that such donation is made on condition, that the marriage shall be contracted ; for notwithstanding the dowry were appraised, as is above said, yet it would be without effect, if the marriage should not be contracted. And therefore, until the marriage is accomplished, the loss, or profit sustained in the dowry, will be for the wife, although it should be in the possession of the husband. But if the dowry had not been estimated at the time the wife gave it to her husband ; then the profit or loss thereon, whenever it may happen, will regard the wife only, independent of the fruits and profits arising therefrom, which the husband ought to have for the support of the marriage. And if at the time the wife constituted the dowry, she had done it by saying thus, “ that she gave certain houses in dowry, which she appraised at two hundred maravedis.” If then the marriage should be dissolved, it will be, at the option of the husband to restore the houses, or the two hundred maravedis : and in that case, the profit or loss of the dowry, would be on account of the wife and not the husband, if he should prefer to restore the houses, whether they were ameliorated or deteriorated : unless the wife can prove that the loss sustained by the

things, she gave in dowry, had arisen from the fault of the husband : or that he had taken upon himself at the time she gave the dowry the risk of all the damage that might happen to it. (1)

LAW 19.

When the damage sustained by the things given in dowry, must be suffered by the wife, and not the husband.

When the wife designates to the husband, a house, or a vineyard, or other estate, as her dowry, appraising its value ; if she reserves to herself the choice, either to take back what she had given in dowry, or the price at which she had estimated it ; if then the marriage should be dissolved, and she should not grant to her husband his choice, according as is said in the law preceding this ; in that case, the profit or loss arising from the amelioration or deterioration of the dowry, will be on her account, and not her husband's. And it may happen, that, when the wife constitutes the dowry, she may not say whether she reserves to herself, or gives to her husband, the above mentioned choice ; but that she gives such a thing in dowry, appraised at so many maravedis : and that she makes the appraisement, in order, that if the thing come to be deteriorated, she may thereby know the amount of such deterioration : in this case likewise, the profit or loss on the dowry, will be on account of the wife, and not of the husband. (2)

(1) R. l. 5, tit. 9, b. 5—ibid l. 2, tit. 16. b. 5—see the laws of the tit. 2, b. 1—ibid, C. art. 33, p. 328—ibid, art. 43 and 47, p. 330.

(2) R. l. 1, tit. 9, b. 5—C art. 34, p. 328.

LAW 20.

On whose account is the profit or loss on slaves given in dowry, when they increase, or decrease in value, or die.

Ancilla in Latin, means in common speech, a female slave. And as it sometimes happens, that women give female slaves, in dowry, to their husbands ; we shall therefore speak of them, in this place. And we say, that if the wife give a female slave to her husband, appraising her value at the time ; and the husband promises to give her, the amount of the appraisement of such slave, when the marriage comes to be dissolved by death, or a judgment of court : in that case, the profit or loss happening on account of the slave, will be for the husband. And so if the slave should have children, they also will belong to the husband. But if the husband take upon himself the risk of the decrease of value only of the slave, and not of her death ; or the risk of her death, and not of the decrease of the value ; in that case, although, the slave had been appraised, the child, or children born of her, will not belong to the husband, but to the wife. And if the wife had not given the slave to her husband, with the appraisement of her value ; then the profit or loss arising from such slave, will be for the wife and not the husband. (1)

(1) R. l. 5, tit. 9, b. 5—C. art. 34, p. 328—ibid, art. 50, p. 332.

LAW 21.

Of cattle given in dowry; and of other things which can be counted, weighed, or measured: to whom belongs the profit, or who sustains the loss arising from them.

Women sometimes give herds of cattle, in dowry, to their husbands. And if no appraisement of them, be made at the time they are settled in dowry, they will be at the risk of the wife; and the husband will enjoy the fruits of them, in order to support the marriage, while it subsists. But if any of the cattle, given by the wife to the husband in dowry, should die, the husband will be bound to replace their number out of the increase of the flock. But if the wife settled the dowry of things that could be counted; as of a sum of money of any kind: or of things that could be weighed, as of gold, or silver, or of any other metal whatever; or of wax, or other like thing: or of things that can be measured, as wheat, wine or oil; or of any other thing that can be measured; all the profit or loss arising from any of these things, after they were given, will be for the husband, and not for the wife. And this because, as soon as they are given by the wife, the husband may sell them, or do as he pleases with them, for his own use, and to support the marriage while it continues. Nevertheless, the husband will be obliged to restore to the wife, an equal quantity, and of the same sort of things which she had given to him, if the marriage should be dissolved during her life, without her fault; or by death. (1)

(1) *l. 5. tit. 9. b. 5---C. art. 46. p. 330 and art. 50. p. 332.*

LAW 22.

Who runs the risk of the dowry, where it is lost by a judgment of court.

If a man gain of the husband, by a judgment of court, the dowry which the wife had given to him, or which another person had given in her name : if the dowry had not been appraised at the time it was constituted, the risk will be for the wife, if it be lost or deteriorated. But here a distinction must be made : for he who gave the dowry, either obligated himself to guaranty it, to the person who received it, or he did not. If he did so obligate himself, then he will be bound to fulfil his engagement, and this whether it be the wife herself, or another person in her name. And if he had not so obligated himself, then he had either acted in good faith, when he settled the dowry, believing the thing given to be his, and that it was under no impediment whatever : or he had acted in bad faith, believing it to be the property of another person. And if he acted in good faith, when he gave the dowry, he will not be bound to guarantee the husband against eviction : but if he acted in bad faith, he will be bound in that case, to indemnify the husband. We likewise say, that if the husband, after the marriage is contracted, lose by a judgment, the dowry which his wife had given to him : if such dowry had been appraised at the time it was given, then the wife will be obliged to give some other thing, equally valuable with that she had given in dowry. And so it would be, where another person had given the dowry, in her name; for he also would be obliged to make good the loss.

But that which is given to the husband in this way, must be considered as being in the place of the first dowry, and to be used as such.

LAW 23.

In what the cases husband acquires the dowry given to him by his wife; or she the donation made to her by her husband, on account of the marriage.

The husband acquires the dowry given him by his wife, and the wife the donation made her by her husband, on account of the marriage, in either of the three following ways. The first, by a contract stipulated between themselves. The second, by the fault of the wife, when she commits adultery. The third, by custom. And that by contract stipulated between themselves, takes place, where they mutually agree, the one with the other, that in case one of them should die without children, the survivor shall have the whole of the dowry, or donation, or a half of it, accordingly as they shall agree. And this contract ought to be made with equal advantage to both parties. And if it happen to be stipulated in the contract, that the husband should acquire the dowry of the wife, and no mention be made of the donation or arras; then it must be understood that the agreement relative to the dowry, holds likewise with respect to the donation. The third way of acquiring the dowry or donation, which is that of custom, takes place where a custom has, for a long time been observed in any place, by which the wife acquires the donation when the husband dies, and the husband the dowry when the wife dies :

or when there exists a custom by which either of them acquires the donation or dowry, when the other joins a religious order: And that which we say in this law, relative to the three above mentioned cases, wherein the husband acquires the dowry, or the wife the donation, is understood to take place, where the parties have no children together. For if they have any, then the children will have the right of property in the donation or dowry, and the surviving father or mother who had not joined any religious order, or who had not committed adultery, will enjoy the usufruct thereof, during his or her life. We likewise say, that if the father or mother die intestate, without leaving children, or other relation to inherit their estate; the survivor will acquire the dowry or donation made on account of the marriage, as well as other property left by the deceased, and except in this, and the three other cases above mentioned, the donation ought to be restored to the husband, and the dowry to the wife, whenever the marriage is dissolved for any just cause whatever. But if the wife should have any extra garments (*paños escusados*,) which her husband had given her; immediately he dies, they, together with their appurtenances, ought to be restored by the wife to the heirs of the husband: but she will retain the garments which she ordinarily wears. (1)

(1) *R. ll.* 3 & 4, *tit.* 2, *b.* 5---*ibid* *l.* 4, *tit.* 1, *b.* *ibid*---*ll.* 1 & 2, *tit.* 8, *b.* *ibid*---*l.* 2, *tit.* 16, *b.* *ibid*---*C.* *art.* 50, *p.* 156---*ibid* *art.* 47, *p.* 330.

LAW 24.

What ought to be observed where the parties intermarry in one country, having entered into an agreement there, and then go to live in another country, where a custom prevails contrary to their agreement.

It often happens, that when husband and wife intermarry, they agree, that when either of them dies, the survivor shall inherit the donation or arras, which one of them had given to the other, on account of the marriage : or agree as to the manner in which what they may jointly acquire, shall be disposed of : and after they are married, they may chance to go and live in another country, in which a custom prevails repugnant to the agreement they had entered into. And as doubt may arise, when one of them dies, whether the contract they had entered into before, or at the time of the marriage, should be observed, or the custom of the place whither they had removed ; we will explain ourselves in this respect. And we say that the agreement they had made before, or at the time of their marriage, ought to have effect in the manner in which they had stipulated ; and that it will not be prevented by the custom of the place where they had gone to dwell. And so we say it would be, if they had not entered into any agreement : for the custom of the country where they contracted the marriage, ought to have effect as it regards the dowry and arras ; and also with respect to the gains they had made ; and not that

of the place to which they had transferred their domicil.

(1) (a)

LAW 25.

What is necessary for the husband to do, that he may acquire the fruits of the dowry of his wife.

Three things are necessary for the husband, in order that he may acquire the fruits of the dowry given

(1) *R. ll. 2, 4 & 5, tit. 9, b. 5, & ibid l. 2, tit. 16.*

(a) Gregorio Lopez in his second note upon the text, observes that this law is to be understood in relation to goods acquired in the place where the marriage was contracted, and not in relation to those acquired in another territory to which the parties had gone and where a contrary custom prevailed; because a custom does not extend beyond the territory where it is established, unless there was an express agreement to that effect between the parties; then it ought to be observed. The commentator afterwards mentions various exceptions to this law. He first supposes the case where the parties marry in one place, not with the intention of residing there, but of going immediately, either to the place of domicil of the husband or of his wife, or to any other place selected by the husband. In that case he determines, that with respect to the gains of the community, regard must be had to the custom of the place, whither the spouses had transferred their domicil, and not to that where they had contracted marriage: observing that this exception does not apply to the dowry or donations given on account of the marriage, these being invariably regulated by the custom of the place where the contract was made, because the patrimony of the wife ought not to be prejudiced by a change of domicil. The commentator then supposes the case where the marriage had been contracted in the place of the domicil of the husband or wife with the intention of remaining there; and after having dwelt there a certain time; they change their intention, and transfer their domicil to another place. He then discusses the question, by what custom the community of gains ought in that case, to be regulated?

As this question is of the greatest importance in a country where the community of gains is established by law, and where persons daily arrive who were married in other states of the union, in which such community

him by his wife. The first is, that the marriage be contracted. The second that he be put in possession of the dowry. The third that he sustain the burden of the marriage, in supplying his own wants, and those of his wife, children, and the rest of the family. These three things concurring in favor of the husband, he ought to have the fruits of the dowry given to him by

does not exist; we have thought that a translation of that part of the commentary of Lopez, which relates to this interesting point, would be acceptable to our readers. The commentator expresses himself thus:

“ Suppose the marriage is contracted in the place of the domicile of the husband, or in that of the wife, with the intention of fixing their residence there; and they accordingly remain there for a time, but afterwards, change their intentions, and transfer their domicile, to another place: this is precisely the case contemplated by this law, as I have above said. In that case regard must be had, with respect to the gains acquired during the marriage, to the custom of the place where the marriage was contracted, and not to that of the place where the parties, after having changed their intentions, had transferred their domicile. Such is the opinion of Anton. and abb. *in cap. 1 de Sponsal.* Rodericus & Joannes Lupi, as is above said. And therefore if the husband and wife had contracted the marriage at Cordova, (where the custom of the community of gains does not exist,) with the intention of residing there; and afterwards transfer their domicile to Grenada, or some other place where the community of gains between the husband and wife existed: then regard must be had to the custom of Cordova, according to which the wife will have no part of the gains. And if the marriage be contracted at Grenada, or Salamanca where the community of gains exists, and the spouses afterwards transfer their domicile, to Cordova; the acquiescence they make at Cordova will be divided between them: so Joann Lupi, as is above said, observes, he has often known decided in Chancery. Nevertheless I conceive that this law is to be limited to the gains which are made in the place where the marriage was contracted; in which case the custom of that place alone ought to be regarded, and will not effect the gains made in the place whither the parties, after having changed their intention, had transferred their domicile: for with respect to these last, the custom of the place to which they had removed, and in which they had made the gains, ought to be observed. So that if

his wife, whether its value had been appraised or not, save what is above said in the law which spoke of the children of a slave which had been given in dowry, when it is said they ought not to belong to the husband, unless he had taken upon himself, the risk of the deterioration and death of the slave. Nor ought the husband to have the gains acquired by that, or any other

the parties had contracted marriage at Cordova, with the intention of residing there, and afterwards transfer their domicil to Grenada, or to any other place where the community of gains exists; then with respect to the gains they acquired after they had so removed, the custom of Grenada, or of the place to which they had so transferred their domicil, ought to be observed; which appears consonant to law and equity according to what is above said. For if the spouses had lived at Cordova when the marriage was contracted, the custom of Cordova would not have extended to immoveable property acquired elsewhere than in the territory of Cordova. And this because the expressions of the custom concerning the community of gains, disposes only of things, or concerning things, as appears from l. 1. tit. 3. lib. 3. Foro. Leg. in which this custom is written, and which declares that every thing which the husband and wife acquire or purchase together, belongs half to each of them respectively. And when the terms of a custom, or of a statute, dispose of things, then those things must be adjudged according to the custom of the place where they are situated; because a custom effects things themselves, whether they be possessed by a citizen or a stranger. *L. rescripto 6. § 5 de muner & honor*: which does not take place when the custom disposes with respect to persons, as is said by Bart in *L. Cunctos populos, col. 17. vers. sed potest dubitari, 6. de sum. Trin. & Fid. Cathol & Alex, &c. &c.* And this law with respect to things, obtains a *Fortiori*, when there is a change of domicil &c. &c. If however the spouses contract marriage in a place where the community of goods exists, with the intention of residing there, and afterwards when they had changed their intention, they should remove to Cordova: then, with respect to the goods acquired before the change of domicil, regard must be had to the place where the marriage was contracted; and with respect to those acquired after the change of domicil, the custom of Cordova must be observed. This appears to be the general opinion, that the customs of every place ought to be regarded according to this or other similar principles,

slave given to him by his wife in dowry, if such gains arise from a donation made to the slave by any one, or from a legacy left to him by will. But whatever the slave may acquire by manual labour, or with the money of the husband ; such gains as these will belong to the husband and not to the wife. And what we here say of slaves, applies where the husband had not taken them with an appraisement of their value ; nor had taken upon himself the risk of their deterioration and death. (1)

LAW 26.

How the fruits of the dowry ought to be divided, when the marriage is dissolved by a judgment of court.

If the marriage be dissolved during the lives of the married parties, on account of any other impediment existing between them, except that of adultery; the dowry ought to be restored to the wife, according to what we above said. This is understood, where the dowry was not appraised at the time it was given: for if it was then appraised, she ought to have the estimated value, and no more. And as doubts may arise, to whom should belong the fruits yielded by the dowry, which had been given without appraisement, during the year in which the marriage is dissolved, we will here explain ourselves in this respect. And we say that they ought to be divided in this manner : that the husband ought to take as much of the fruits yielded by the dowry, during the last year, as the marriage had subsisted

(1) C. art. 28, p. 328, & art. 50, p. 332.

months and weeks, in that year : and all the risk will remain to the wife, or her heirs, if she be dead ; after deducting the expenses which the husband had incurred during that year in cultivating the thing given in dowry. And the year, ought to begin to run from the day on which the marriage was accomplished by words *in presenti*, and the dowry delivered to the husband, whenever the marriage happens to be dissolved in the same year in which it is contracted. And the above mentioned part which we said the husband ought to have, up to the day the marriage is dissolved, is understood as well of the fruits already gathered at the day of the said dissolution, as those remaining to be gathered in the same year. And so it would be, if the dowry were of such a nature, as to produce fruits twice a year ; or such as to produce them only once in three years. (1)

LAW 27.

Of the trees that are cut or torn down, on an estate which had been given in dowry ; and whose they are.

If the husband cut down any trees, which it is not customary to cut, from the estate which had been given him in dowry by his wife, without an estimation of its value, they will not belong to the husband, but to the wife. For he cannot take, or cut trees as fruits ; though he may gather the fruits before the trees are cut. And so it would be, if the trees were torn up by the roots, or thrown down by the wind, or cut down by

(1) *R. l. 5, tit. 9, b. 5---C. art. 69, p. 336.*

any other person : for they will belong to the wife and not to the husband. So it would be if the wife had given the husband in dowry, an estate in which a stone quarry was afterwards found. For if the quarry be of such a nature as not to renew itself, when cut away ; it will belong to the wife and not to the husband. But if it were of such a nature as to increase, as happens in certain places ; such increase will belong to the husband, as long as the marriage subsists.

LAW 28.

Of the fruits which the husband gathers from the dowry before marriage.

Husbands sometimes gather, before marriage, the fruits of the dowry given them by their wives. In this case the husband will not acquire such fruits, but they will go to the increase of the dowry, and will be added thereto, and counted as a part of the same. And although, after the celebration of the marriage, such fruits, as well as the dowry itself, will remain in the hands of the husband, that he may make use of them to support the marriage : yet if the marriage come to be dissolved, they will remain free to the wife. But if the husband had furnished the wife, with food and cloathing, before the marriage ; the fruits he had gathered during that time, ought not to be reckoned a part of the dowry, nor can they be demanded of the husband. This arises from a principle of equity, and not the force of law. And this may happen to be the case, when a man betrothes himself to a woman

not of age, and he is obliged to wait until she comes of age. (1)

LAW 29.

Whether the wife can, during marriage, demand the dowry which she had given her husband.

If the husband waste and dissipate what he has, so that his wife conceives, that he may, by his fault, be reduced to poverty ; as if he be a gambler, or have other bad habits, by which he extravagantly (*locamente*) consumes his property ; and she be afraid that he may dissipate, or make bad use of her dowry ; she may then require him judicially, to deliver it up to her, or to give security that he will not alienate it ; or that he will put it into the hands of some other person, who will take care of it and acquire lawful and honest gains therefrom, and give them to the spouses for their subsistence. And this may be done during the marriage. But if the husband be prudent in administering and managing his own estate, and does not dissipate it extravagantly, as is above said ; though he should come to poverty by any accident, the wife cannot, on that account, demand her dowry of him during marriage. And in this case, the rule of law applies ; that the wife who puts her person under the power of her husband, ought not to take from him, the dowry she had given him. (2)

(1) *R. l. 5, tit. 9, b. 5, and see the laws of the tit. 2, b. ibid.*

(2) *C. art. 44, p. 330, and art. 86, p. 340.*

LAW 30.

To whom the dowry ought to be given, when the wife dies.

If the wife die, during the marriage between herself and her husband, without leaving children who inherit from her ; the dowry ought to be delivered to her father. And this is understood, where the dowry is *profectitia*, that is when it is given out of the estate of her father ; unless the husband had acquired it, in either of the three ways mentioned in the 23d law of this title. But if the marriage should be dissolved during the life of the daughter, on account of any lawful impediment, and the dowry be *profectitia*, it ought to be restored to the father, if he be living, conjointly with the daughter. And if the father be dead, it ought to be restored to the daughter, whether she have children or not. And if the dowry be *adventitia*, and a divorce take place, during the life of the wife, it ought likewise to be restored to her, and not to her father, although he should be living. And if the dowry had been given by any other person than her father, simply, without any condition annexed : if she die without children, then the dowry ought to be delivered to the heirs of the wife. And if the person who settled the dowry, had annexed any stipulation to it, at the time he gave it, such stipulation must be accordingly observed.

(1)

(1) *R. l. 2. tit. 5—ibid ll. 4 and 5, tit. 8, b. 5,*

LAW 31.

At what time the dowry ought to be delivered to the heirs of the wife.

When the marriage is dissolved, for any legal cause, as soon as the divorce takes place, the dowry, if it be an immoveable thing, ought to be delivered to the wife, or her heirs. But if it be a moveable thing, it ought not to be delivered until one year after the divorce took place. And so it would be if the marriage was dissolved by death. For the dowry or donation, ought to be delivered to the person entitled to it, if it be an immoveable thing, as soon as the marriage is dissolved ; and if it be a moveable thing; within one year afterwards : unless it was necessary to deliver it to children, not of age : for in that case, the father or mother may retain it, until they come of age. And it is understood that this ought to be done in such way, that the father or mother support and rear the children ; and that they neither sell nor dissipate the dowry. (1)

LAW 32.

What expenses the husband may claim and recover, when he delivers the dowry to his wife or to his heirs, whenever the marriage is dissolved by a judgment of court, or by death.

When the husband ameliorates the thing given to him by his wife in dowry, without appraisement ; as if he repair or add to it, so that it be in a better condition, or yielded more : if the expenses he have incur-

(1) *R. ll. of the title 8, b. 5—C. art. 45, 46, p. 330.*

red be such, as had ameliorated the dowry, he may take an account of them and recover whatever they amounted to, over and above the fruits and rents which he had gathered from the dowry. But if the husband voluntarily incur expenses, on account of the dowry, which contribute rather to its ornament (*apostura*) than benefit: as if it consist of houses, and he paint them, or do other like work to them: he cannot take any account of them, nor can he claim them, when the dowry is delivered up. And if it happen that the husband cannot immediately deliver up the dowry at the time mentioned in the law preceding this, the judge of the place ought to take care that he pay as much as he can, so that something, nevertheless, remain to him to live upon, taking from him security, to pay the balance, as soon as he possibly could. The same law must be observed with respect to the children, in case it should happen that they should have to restore the dowry to their mother, on account of their father. (1)

(1) *R. l. 5, tit. 9, b. 5—C. art. 55, p. 334, and 70, p. 338.*

TITLES,

Of the Roman Laws and of the Civil Code which relate to the title of LAS SIETE PARTIDAS, on second marriages.

Code lib. 5. tit. 9. - - - - - *De secundis nuptiis.*

Novell. coll. 4. tit. 1. chap. 22. - - - - *De secundis nuptiis.*

Civil Code B. 1. tit. 4. chap. 6.

OF THOSE WHO MARRY A SECOND TIME, &c.

Whether men can marry a second time, and who

can do it, - - - - - LAW 1

Who ought or ought not to bestow a benediction

upon those who marry a second time, - - - - 2

When the wife does or does not, incur a penalty

when she marries immediately after her husband is dead, - - - - - 3

TITLE XII.

Of those who marry a second time after the dissolution of the first marriage.

LAW 1.

Whether men can marry a second time or oftener : and who can do it.

According to holy church, men and women may marry a second time, or oftener, after the first marriage is dissolved, either on account of some legal impediment, or by death. And all those, who have not promised to join a religious order, may marry, after they are separated from their wives, for any of the above mentioned causes. And so of those who have

not received holy orders : or who are not frigid by nature. And so we say, that the same law applies to women, as well as men. (1)

LAW 2.

Who ought, or ought not, to bestow a benediction upon those who marry a second time.

(Not in force.)

LAW 3.

When the wife does, or does not, incur a penalty, when she marries immediately after her first husband is dead.

The wife is free and quit of all the obligations of matrimony, after the death of her husband, according to what is said by Saint Paul. And therefore the holy church have thought proper, not to impose any penalty upon her, if she should marry after the death of her husband, provided she marry as she ought to do, and not against the prohibition of the holy church. But the secular law prohibits her from marrying within one year afterwards; and imposes a penalty upon these who marry before that time, which penalty is that she be reputed infamous (*de mala fama*); that she lose the arras, and other donations made her by her deceased husband, and all other things which he had left her by will, and they will belong to the children left by him: and if he left no children, then to the relatives who inherit from him.

(No other part of this law in force.) [a] [1]

(1) *C art. 31, p. 28.*

[a] By the Civil Code, art. 31, p. 28, the wife cannot contract a second marriage, until ten months after the dissolution of the first.

(1) *R. l. 3, tit. 1, b. 5.*

TITLES,

Of the Roman and Spanish Laws and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
legitimate children.

Code lib. 6. tit. 55. - - - *De suis et legitimis liberis, &c.*
Novell. coll. 6. tit. 3. ch. 6. *Qui sint filii legitimi, natu-
rales et neutrum, &c.*

Fuero Viejo b. 5. tit. 6.

Civil Code, b. 1. tit. 7. chap. 1 and 2.

OF LEGITIMATE CHILDREN.

What is meant by legitimate children, and who
ought to be so called, - - - - - LAW 1
What are the advantages and honors enjoyed by
legitimate children, - - - - - 2

 TITLE XIII.

Of legitimate children.

LAW 1.

*What is meant by legitimate children, and who ought to be so
called.*

By a legitimate child is meant he who is begotten
according to law: and they are called legitimate, who
are born of a father and mother, who are really marri-
ed, according to the ordinances of holy church. And
although it should happen, that between those who

were married openly and publicly in the church, there should exist any impediment for which the marriage ought to be dissolved ; yet the children they beget (*fiziessen*) before they knew of such impediment, will be legitimate. And so it would be, as well where both of the spouses were ignorant of the existence of the impediment, as when one only of them knew of it : for the ignorance of one of the spouses alone, would render the children legitimate. But if after they knew with certainty of the existence of such impediment, they should beget children ; those that they afterwards have, will not be legitimate. Yet if during the existence of such impediment, and while both, or one of them was ignorant of it, they should be accused before the judges of the holy church ; and before the impediment was proved, or the sentence pronounced, they should have children : those that they beget (*fiziessen*) during the existence of the doubt, will all be legitimate. And so the children a man has by his concubine (*baragana*) will be legitimate, if he afterwards marry her. For although they are not legitimate, when they are born, yet so great is the force of matrimony, that they become legitimate immediately their father and mother are married. And so it would be, if a man have a child by his slave, and he afterwards marry her. For marriage has so great an effect, that as soon as it is contracted, the mother becomes thereby free, and the children legitimate. (1)

(1) *R. ll. 1 and 10, tit. 8. b. 5---C. art. 2, ff. 44—ibid art. 21, ff. 48.*

LAW 2.

What are the advantages and honors enjoyed by legitimate children.

Children derive great honor and advantage from being legitimate : for they thereby enjoy the honors appertaining to their fathers. They may, likewise, be promoted to the dignities, and receive the holy orders of the church, and other secular honors ; and they may also inherit from their fathers and grand-fathers, and their other relations, according to what is said in the title concerning successions ; which other children who are illegitimate, can not do. (1)



TITLE XIV.

Of other women with whom men live, without being married to them, (que non son de bendiciones.)

[Not in force.] (a)

(1) C. art. 54, p. 54---ibid art. 23, p. 48, and art. 45, p. 154.

(a) A woman of the description here alluded to, is in Spanish called *Baragana* ; which word means a concubine whom a man keeps alone in his house, unconnected with any other woman. It was necessary that such a concubine should not be a woman of debauched life, and that she should be possessed of other qualities mentioned in this title.

TITLES,

Of the Roman Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on illegitimate children.

Code lib. 25. tit. 27. - - - - *De naturalibus liberis, &c.*

Novell. coll. 6. tit. 3. - - - - *Quibus modis naturales filii efficiuntur legitimi et sui, &c.*

Novell. coll. 7. tit. 1. - - - - *Quibus modis naturales efficiuntur sui, &c.*

Civil Code, book 1, tit. 7, chap. 3.

OF ILLEGITIMATE CHILDREN.

What is meant by illegitimate children ; and why they are so ; and how many kinds there are,	LAW 1
What is the reason why some children are illegitimate, though born in wedlock, - - - - -	2
Of the disadvantages illegitimate children labour under, (a) - - - - -	3
In what manner fathers may legitimate their children by written instrument, - - - - -	7
In what manner illegitimate children may render themselves legitimate, - - - - -	8
What advantages children derive from being legitimated, - - - - -	9

(a) The heads of the laws 4, 5 and 6, have been omitted as being not in force.

TITLE XV.

Of Illegitimate Children.

LAW 1.

*What is meant by illegitimate children ; and why they are so ;
and how many kinds of them there are.*

The ancient sages called those natural and illegitimate children, who are not born of lawful marriage : such as the children of concubines (*baraganas*). And they denominated bastards, (*fornezinos*), those who are born of an adulterous connexion, or of a woman related to the father, or who was of a religious order. And these are not called natural children, as they are begotten contrary to law and natural reason. There are likewise other children, called in Latin *manzeres*, a term derived from two Latin words, *manna scelus*, which means *an infernal sin*. For they who are called *manzeres* are born of women who inhabit brothels, and prostitute themselves to every one that comes : wherefore it cannot be known who are the fathers of the children born of them. And there are some persons who say that the term *manza*, comes from the Spanish word *manzillado* : because such children are base begotten, and are born in vile places. There are also other children, called in Latin *spurii* : which means those that are born of women who are kept by men, as concubines, elsewhere than in their houses, and who have commerce with other men, than those who keep

them, as their mistresses, so that it cannot be known who is the father of the children born of such women. And there is yet another sort of children called *notos*; that is they who are born of an adulterous connexion. They are called *notos*, because they appear to be the acknowledged children of the husband who keeps the mother in his house, when in truth they are not his.
(1)

LAW 2.

What is the reason that some children are illegitimate, though born in wedlock.

Some people marry clandestinely and in secret, and have children. If among those who marry in this way, there should be discovered to exist an impediment for which the marriage ought to be dissolved; the children they beget, will not be legitimate: and they cannot excuse themselves by saying, that both, or one of them, were ignorant of the existence of such impediment. And the reason is, because, it ought to be presumed that the parties were not willing to inform themselves whether there existed any impediment to their marriage, in as much as they intermarried in secret. Neither will the children of those be legitimate, who knew that there existed between them, an impediment that ought to prevent them from intermarrying, notwithstanding they were married publicly in the church, and no person had denounced them, or brought an accusation against them, on account of the impediment. And this is understood, where both the

(1) *R. II. 7 & 9, tit. 8, b. 5—C. art. 3, 4 & 5, p. 44.*

husband and wife, knew of the existence of the impediment. Likewise those children who are born of parents not married according to the ordinances of holy church, are not legitimate. We likewise say, that if a man who is lawfully married, have children by a concubine, in the life time of his wife, such children will not be legitimate, notwithstanding the lawful wife die afterwards, and he marry the concubine: and the reason is, that such children are adulterous. (1)

LAW 3.

Of the disadvantages illegitimate children labour under.

Children sustain great damage on account of their illegitimacy. First, they cannot enjoy the honors of their fathers and grand-fathers. And likewise, if any dignities or honors be conferred on them, they may be deprived of them, on that account. And moreover, they can not inherit the estates of their fathers, or grand-fathers, nor of other relations descending from them, as is said in the laws of the title of successions, which speak of that matter. (2)

LAW 7. (a)

In what manner fathers may legitimate their children, by written instrument. (carta.)

Another way of legitimating natural children, is where a father declares by a writing executed by his

(1) *R. l. 1, tit. 1, b. 5—C. art. 21, p. 48.*

(2) *R. l. 10. tit. 8. b. 5.—C. art. 28. p. 48.*

(a) The preceding laws, 4, 5, & 6, being considered as not in force, have not been translated.

own hand, or which he causes to be executed by a notary public, and attested by three witnesses, that he acknowledge such a one for his son, designating him expressly by name. But in such acknowledgement, the father ought not to say he is his natural son; for if he does, the legitimation will have no effect. Likewise, where a man has several children by a concubine (*amiga*), and he acknowledge one of them only in writing, in the manner above mentioned; by such acknowledgement, the other brothers and sisters will be legitimated, though no mention be made of them, so far as to enable them to inherit the estate of their father, as effectually as the one whose name is mentioned in the writing. And what we say in this and the preceding laws, is to be so understood, that they who are therein mentioned as being legitimated, can inherit, both the estates of their fathers, and other relations; except, however, the child who is legitimated in the manner mentioned in the next law, when he goes in person and offers himself for the service of the court of the emperor or king: for such a child can inherit the estate of his father only, and not that of his other relations, if they die intestate. (1)

LAW 8.

In what manner illegitimate children may render themselves legitimate.

(Not in force)

(1) *R. l. 10. tit. 8. b. 5.*

LAW 9.

What advantage children derive from being legitimated.

Children derive great advantage from being legitimated: for as soon as they become so in any of the ways before mentioned, except when legitimated by the pope, as is said in the sixth law previous to this; they can inherit the estates of their fathers, if the latter have no legitimate children; and if they have any, then the legitimated children, will inherit their part, the same as the legitimate do: unless the child has been legitimated by offering himself for the service of the king, or council of any town or city, as is said in the preceding law. And there arises also another advantage from legitimation: for the legitimated children, may be raised to all the honors and temporal dignities of their fathers, in the same manner as children who are born legitimate. (1)

TITLE XVI.

Of Adopted Children. (a)

(1) *R. l. 20. tit. 12. b. 2.—ibid. l. 12. tit. 2. b. 6. l. 10. tit. 8. b. 5.*

(a) There are ten laws in this title, none of them are translated, as they have been repealed by act. 35 p. 50, of the Civil Code.

TITLES,

Of the Roman Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on paternal authority.

Digest lib. 1. tit. 6. - - - - - *De his qui sui rei alieni juris sunt.*

Institutes lib. 1. tit. 9. - - - - - *De patria potestate.*

Code lib. 8. tit. 47. - - - - - *De patria potestate.*

Civil Code b. 1. tit. 7. chap. 5.

OF THE AUTHORITY WHICH PARENTS HAVE
OVER THEIR CHILDREN.

What is meant by the authority which the father has over his children, - - - - -	LAW 1
Over what children the father has not this power, - - - - -	2
In how many ways the word <i>potestas</i> is to be understood, - - - - -	3
How the power which the father has over his children, may be established, - - - - -	4
Of the effect of the power of the father over his children in relation to the property of the latter, - - - - -	5
That sons may do what they please with the things they acquire in a castle, in the army, or at court, notwithstanding they are under the power of their fathers, - - - - -	6
What are the things which are acquired by sons that are called <i>quasi castrense peculium</i> , - - - -	7
In what case a father may sell or pledge his son,	8
That the son sold by his father, may be redeemed and restored to the liberty, - - - - -	9

That the father may require of the judge to cause his son to come under his power, if he be not so already ; and if the son should not be wil- ling to obey his father, - - - - -	LAW 10
That the son ought not to sue his father, - - - -	11
In what case the son under the power of his father, can sue or answer to a suit, - - - - -	12

TITLE XVII.

*Of the authority which parents have over their chil-
dren, of whatever sort they may be,*

LAW 1,

*What is meant by the power which the father has over his
children.*

Patria potestas in Latin, means in common speech, the power which fathers have over their children. And this power is a right expressly established and observed in these countries governed by the ancient laws, which have been compiled (*fizieron*) by philosophers and sages, under the command and authority of the emperors. And fathers have this power, not only over their children, but grand-children, and all others of their posterity, descended from them in a right line, and who are born in lawful wedlock. (1)

(1) See the laws of the chap. 5, tit, 7, b. 1st, of the Civil Code.

LAW 2.

Over what children the father has not this power.

They are called natural children, whom men have by concubines, as was said in the title which spoke of them. Such children are not under the power of the father, as legitimate children are. Neither are those children called in Latin, *incestuosi*; that is those whom men have by their relations, nor those connected with them in the fourth degree, or by women of religious orders, subject to the power of the father. For such as these, are not worthy to be called children, as they are begotten in sin. And although the father has power over his legitimate children, or grand-children, or great-grand-children, who descend from his children; yet it ought not to be inferred hence, that the mother has power over them, or any relations on her side. And we likewise say that children born of daughters, remain under the power of the father of such children, and not under that of their maternal grand-father. (1)

LAW 3.

In how many ways the word potestas is to be understood.

The Latin word *potestas*, which signifies power, in common speech, is taken in divers acceptations. For it is sometimes taken for dominion (*senorio*), and as such corresponds with the power which the master has over his slave. Sometimes it is taken for jurisdiction, in relation to the power which the king, and they who

(1) *R.l.* 7, *tit.* 8, *b.* 5---*C. art.* 59, *p.* 56,

represent him, have over those whom they have the power to judge. Sometimes it is taken for the power which bishops have over the clergy, or which abbeyes have over the monks who are bound to obey them. And sometimes the word *potestas*, is taken for the obligation of respect and submission, and right of correction which the father has over his children. It is of this last sort of power we shall speak of, in the laws of this title. (1)

LAW 4.

How the power which the father has over his children, may be established.

The power which the father has over his children, may be established in four different ways. First, by marriage, contracted according to the ordinances of holy church. The second, where a dispute arises between persons, whether or not, they are father and son; and a definitive judgement be pronounced, decreeing them to be so. The third is where the father had emancipated his son, from his power, and the son afterwards commit some offence against his father, for which he is condemned again to return under the power of the father. The fourth is by adoption; as where the maternal grand-father adopts his grand-son; for then the grand-son will come under the power of his grand-father.

(1) C. art. 36 & 41, p. 52.

LAW 5.

Of the effect of the power of the father over his children, in relation to the property of the latter.

The property which children acquire, while they are under the power of their father, is divided into three sorts. The first is that which children make out of the property of their father: this sort of acquisition is called in Latin *profectitium peculium*. For all that children acquire in this way, or by means of their fathers, belong entirely to their fathers who have them under their power. The second is that which the child acquires by the labour of his hands, or by some trade or science (*sabidura*) which he possesses, or in some other way: or from a donation which any one makes to him by will; or from the succession of his mother, or of any of her relations, or in any other way: or where he finds a treasure, or any other thing by chance. For that which the child acquires by any of these means, and which do not proceed from the estate of his father or grand-father, will be his own in right of property, and the usufruct thereof will belong to the father, during his life, in virtue of the power which he has over his child. And this sort of acquisition is called in Latin *adventitia*, because it is derived from other sources than the estate of the father. Nevertheless we say that the father ought, during his life, to defend and take care of the adventitious property of his son, as well in, as out of court. The third sort of property acquired by the son, is that which is called

in Latin *Castrense, vel quasi castrense peculium*, as will be hereafter shewn. (1)

LAW 6.

That sons may do what they please with the things which they acquire in a castle, in the army, or at court, notwithstanding they are under the power of their fathers.

Castra, is a Latin word which is used in three acceptations. The first, and most common, is when it signifies any castle, or place, which is encircled with walls, or other fortifications. The second is where it signifies a camp, or a fortified entrenchment where many persons are united together, and is hence called in Latin *Castra*. The third is where it signifies the court of the king or of any other prince, where many people assemble together; as in the fortress of a lord, and at an assylum of justice. And on that account, all which men acquire in any of these places, takes its name from the Latin word *castra*, and is hence called *castrense, vel quasi castrense peculium*. And also because men make such acquisitions with great labour, and risk, and in noble places; they therefore belong entirely to those who make them, and are less incumbered than their other acquisitions. For the owners of them may do with them whatever they please; nor have their fathers, or brothers, or any other of their relations, any right to such acquisitions, or can in any way affect the enjoyment of them. (2)

(1) *R*, ll. 8 & 9. tit. 1. b. 5.—*Ibid*. ll. 3. 4. & 5. tit. 9. b. 5,—*C. art.* 42 & 43. p. 52.

(2) *C. art.* 46. p. 52.

LAW 7.

What are the things which are acquired by sons, and that are called quasi castrense peculium (pegujar de aluergada.)

All the property which men acquire in any of the three places mentioned in the preceding law, is called in Latin *castrense peculium*, such as the pay which lords give their vassals, whether they be military men (*cavaleros*), or other persons who serve on horseback, or on foot. There are also other acquisitions called in Latin *quasi castrense*; which means, in common speech acquisitions which resemble the others; such as are given to the masters of any science whatever, whether of the king's chamber, or of any other public place, in the nature of pay, or as a salary. And likewise that which is given to the judges and notaries of the king, on account of the offices they hold; and also that which is given, in the same way, to any person whatever. And so we say that every gift of an estate, or of any other thing whatever, made by the king, or by any of the above mentioned lords, is *quasi castrense*. For property acquired this way, belongs exclusively to those who have acquired it.

LAW 8.

For what cause a father may sell or pledge his son.

(Not in force.)

LAW 9.

That the son who is sold by his father, may be redeemed and restored to his liberty.

(Not in force.)

LAW 10.

That the father may require of the judge to cause his son to come under his power, if he be not already; or if the son should not be willing to obey the father.

The father has yet another power over his son. For if any other person should detain him in his power, by force, or with the consent of the child; nevertheless the father may obtain a judgment of court, to restore his child to his authority again. And so it would be, if the child wander voluntarily about the country, not being willing to obey his father: for then the father may require the judge of the place, where he finds his son, to cause him to return under his power: and the judge will be bound to do it, in virtue of his office.

LAW 11.

That the son ought not to sue his father.

The son ought not to sue his father, unless it be on account of acquisitions made in the way of *peculium castrense*, or *quasi castrense*, according to what is said above. But if the son ask permission of the judge, who has power to decide all causes, to cite his father before him, on account of some complaint he has against his father: if the judge grant him that permission, then the son may cite his father, but not otherwise; nor can the son cite any other person to appear in court, without the authority of his father, as long as he is under his power. And so likewise, no other person can bring the son into court, without the

authority of his father. For as a suit instituted by the son against a third person, without the consent of the father, would not be valid : neither would a suit instituted against the son, without the consent of the father, be valid. Yet if the son be bound to give any thing to another, or do something for him, the father may be compelled to cause his son to appear in court, or to appear for him.

LAW 12.

In what cases the son under the power of his father, can sue, or answer to a suit.

The son who is under the power of his father, is called in Latin, *filius familias*. And although we said in the next preceding law, that as such, the son could not appear in court, either as plaintiff or defendant, without the consent of his father ; yet there are cases in which he may. As when the father has sent him to the public schools to receive his education, or to any other place where he did not reside ; or had sent him elsewhere to serve his lord, or to any other place whatever. For if while he was gone in this way, any thing happen to be stolen from him, or injury to be done to him, or any other person was bound to give him any thing ; he may bring suit therefor. We likewise say that he will be obliged to answer, if any one make complaint against him. And the reason that he may sue, or is bound to answer, in the manner above mentioned, is this : that if the son were obliged to come and ask permission of his father to sue, or to answer to a suit, it might happen that either he, or the

person who intended to sue him, might lose his right, as we have said in the third Partida, in the title of plaintiff.

TITLES,

Of the Roman and of the Spanish Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on the causes for which paternal power ceases.

Digest lib. 1. tit. 7. - - - - - *De adoptionibus and emancipationibus &c.*

Institutes lib. 1. tit 12. - - - *Quibus modis jus patriae potestatis solvitur.*

Recopilacion de Castilla, b. 5. tit. 1. l. 8.

Civil Code b. 1. tit. 8. chap. 3.

OF THE CAUSES FOR WHICH THE PATERNAL POWER CEASES.

That the paternal power is destroyed by the natural death of the father, - - - - - **LAW 1**

That paternal power is destroyed by a judgment of banishment, which in Latin is called a civil death, (a) - - - - - **2**

That the son ceases to be under the power of his father by emancipation, - - - - - **15**

That the father may emancipate his children, when they are not present, or under seven years of age, - - - - - **16**

(a) The heads of the following laws from the 3d to the 14th inclusive, are omitted, as not being in force.

That emancipation must be voluntarily made both on the part of the father, as well as of the chil- dren, - - - - -	LAW 17
For what causes the father may be compelled to emancipate his children from his power, - - -	18
That the son may, if he be disobedient after he is emancipated, be compelled to return under the power of his father, - - - - -	19



TITLE XVIII.

Of the causes for which the paternal power ceases.

LAW 1.

*That the paternal power, is destroyed by the natural death of
the father.*

The power which the father has over his son, is dissolved by his natural death: for as soon as the father dies, the son is left master of himself. But this is understood where the deceased had already ceased to be under the power of *his* father. For if he had not, then in case of his death, his children will remain under the power of their grand-father, in the same manner they were while their father was living. But if any person die, leaving children or grand-children under his power; as soon as he is dead, his children remain masters of themselves, and the grand-children of the deceased, return under the power of their father. (a)

(a) By the Civil Code p. 52 art. 37, it would seem that the paternal power could be exercised by the father only, and not by the grand-father, even in the case mentioned in this law.

LAW 2.

*That paternal power is destroyed by a judgment of banishment,
which in Latin is called a civil death.*

(Not in force.) [a]

LAW 15.

*That the son ceases to be under the power of the father by
emancipation.*

Emancipation is another way, not mentioned above, by which children are freed from the power of their fathers. It is done in the following manner. The father must go with the son whom he intends to emancipate from his power, before the judge who has the power of determining all suits, and who is in Latin called *ordinarius*. And both the father and the son, being before the judge, the father must declare, that he emancipates his son from his power, and the son must consent to it. And the father may, in consideration of such emancipation, retain for his own benefit, one half of the usufruct of the adventitious effects of his son. And it is always understood that he has this half as a recompense for the emancipation, unless he expressly renounce it. (1)

[a] This and the subsequent laws, as far as the sixth inclusively, speak of various penalties which amount to a civil death. They are not conceived to be in force: nor are the subsequent laws as far as the fifteenth, which treat of the different dignities by which a son is enfranchised from the power of his father.

(1) *R. l. 8. tit. 1. b. 5—C. art. 87. 88. & 89. p. 74.*

LAW 16.

How the father may emancipate his children, when they are not present, or are under seven years of age.

[Not in force.] (a)

LAW 17.

That emancipation must be voluntarily made, both on the part of the father, as well as of the children.

The father can not be compelled to emancipate his son, nor can the son be emancipated against his will: but it should be done voluntarily, as well on one side as the other, without any judgment of court, or any restraint whatever. It must be moreover done publicly: that is, it must be done before the judge of the place in whose presence they must reciprocally agree. And the father must cause a writing (*carta*) to be drawn up, by which he emancipates his son from his power, in order that the emancipation might be proved, and no doubt arise.

LAW 18.

For what causes the father may be compelled to emancipate his children from his power.

Notwithstanding we said, in the laws preceding this, that the father could not be compelled to emancipate his children, yet there are four reasons for which he

(a) By this law the father is not permitted to emancipate his son, who is not seven years of age complete, without the permission of the king. This provision being now unpracticable, and it having been enacted, Civil Code p. 74. art. 88, that a minor can not be emancipated, unless he be fifteen years, old the translation of this law is omitted. The presence of the son, is not required by the article of the code here cited.

may be so compelled. The first is where he chastises his children cruelly and without that pity which nature inspires: for the chastisement ought to be moderately inflicted, and with compassion. The second is where the father is so abandoned as to induce his daughters, to prostitute their persons, compelling them thereto. The third is where one man bequeathes any thing to another, on condition that the latter should emancipate his children. For if the father receive the legacy so made to him, he will be bound to emancipate his children: and if he be unwilling, he may be compelled to do it. The fourth is where any one adopts his step-son who is a minor under fourteen years of age. For if the step-son, after he has passed his fourteenth year, be illy treated by his step-father who wastes his estate, or otherwise treats him ill; he ought to make it known to the judge, who, if he finds it to be so, ought to cause the step-father to emancipate the step-son.

LAW 19.

That the son may, if disobedient, after he is emancipated, be compelled to return under the power of his father.

They are called ungrateful who feel no sense of gratitude for favours done them. And these are persons, who, instead of being grateful and serving those from whom they have received favours, treat them illy, and harm them, both by word and deed. And this is one of the greatest faults a man can commit. If, therefore, the son who has been emancipated, be guilty of

such a fault towards his father, defaming him by words and by deed, he ought then to return under the power of his father again.

TITLES,

Of the Roman and Spanish Laws and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, which directs that fathers ought to rear up their children, and children support their fathers, &c.

Digest lib. 25. tit. 3. - - - *De agnoscendis et alendis liberis, &c.*

Code lib. 5. tit. 25. - - - - *De alendis liberis et parentibus.*

Fuero Real book 3, tit. 8.

Recopilacion de Castilla, book 5, tit. 8, ll. 7 and 8.

Civil Code book 1, tit. 9, chap. 5.

THAT FATHERS OUGHT TO REAR UP THEIR CHILDREN, &c.

What is meant by rearing up a child, and what is the effect of it, - - - - - LAW 1

For what reasons and in what manner fathers are bound to rear up their children, notwithstanding they should be unwilling to do it, - - - - - 2

Whether the children ought to be in the care of their father or mother, in order that they may be nourished and reared up, - - - - - 3

In what cases the father and mother are dispensed from maintaining their children whom they were bound to rear up, - - - - - 4

Who are and who are not the children, fathers are	
bound to maintain, - - - - -	LAW 5
For what causes fathers, unless they choose, are	
dispensed from maintaining their children, and	
the children their fathers, - - - - -	6
What ought to be observed when the son demands	
support from his father, who denies that he is his	
son, - - - - -	7

TITLE XIX.

*That fathers ought to rear up their children, and
that children ought to support their fathers when
they are in need.*

LAW 1.

*What is meant by rearing up a child (crianza) and what is the
effect of it.*

To be reared up by any one, is the greatest benefit
one man can bestow upon another. For he who rears
up another, feels great love for the person reared, whe-
ther it be his child or a stranger. And such rearing up,
has very great effect, when it is the father who rears
his son. For although the father naturally loves his
son whom he had begotten, yet his affection is much
increased by rearing him up. Likewise the son is

obliged the more on that account, to obey his father, as he reared him up himself, rather than confide him to another. (1)

LAW 2.

For what reasons, and in what manner, fathers are bound to rear up their children, notwithstanding they should be unwilling to do it.

There are clear and manifest reasons, why fathers and mothers are bound to rear up their children. The first is, the natural impulse which moves all animated beings, to rear up and protect the young born of them. The second is, the love which they naturally have for their offspring. The third is, because all laws both temporal and spiritual, agree in this respect ; and prescribe the manner in which fathers, though they should be unwilling to do it, ought to rear up their children, and give them whatever they stood in need of : that they should also give them wherewith to eat and drink, and to cloath and shoe themselves with, and a place to live in, and all other things necessary for them, and without which men can not live. And this every one is bound to do, according to the fortune and means he possesses : and with respect to the manner in which it should be done, regard must always be paid to the person who is to receive it. And if any one contravene these provisions, the judge of the place, may compel him to comply with them, in the manner above mentioned, either by seizing upon his property,

(1) C. art. 46, p. 52.

or in any other manner whatever. Nevertheless we say, that if, while the father is rearing up and providing for his son, the son should contract any debt which did not turn to the profit of the father, or without his authority ; the father will not be bound to pay it. We likewise say that children, if they have it in their power, ought to assist and provide for their parents, when they stand in need, in the same manner that their parents are bound to provide for them. (1)

LAW 3.

Whether the children ought to be in the care of the father or mother, in order that they may be nourished and reared up.

The mother ought to nourish and rear her children who are under three years of age, and the father, those who are above that age. But if the mother be so poor that she cannot take care of them, then the father is bound to furnish her, with whatever is necessary for that purpose. And if the spouses happen to separate for any just cause, the party through whose fault the separation took place, will be bound to furnish, out of his own estate, if he be rich, whatever is necessary to rear the children, whether they be above or below three years of age : and the other who is not in fault, ought to take them under his or her care, and maintain them. But if the mother should have them under care for the reasons above mentioned, and she get married again ; then she ought not to retain them : nor will the father be obliged to furnish her, with any thing

(1) *C. art. 46, 48, 49, p. 52 & 54.*

for their support ; but ought on the contrary, to take them under his care, and rear and nourish them, if he have wherewith to do it. (1)

LAW 4.

For what causes the father and mother are dispensed from maintaining their children whom they were bound to rear up.

Poverty sometimes dispenses men from doing certain things which they were, by law, bound to do. And therefore, notwithstanding we said in the preceding law, that the spouse, by whose fault the separation had taken place, is obliged to furnish the other, out of his own estate, wherewith to rear the children they had together ; yet there are cases wherein it is not so. For if the spouse who was in fault, be poor, and the other rich ; then the one who had the means, ought to furnish wherewith to maintain the children. And if both father and mother be so poor that they can not maintain them : if then the grand-father, or great-grand-father of the children, be rich, he will be bound to rear them : for as the child is bound to maintain his father and mother, if they become poor ; or his grand-fathers or his grand-mothers, and his great-grand-fathers and his great-grand-mothers, in a direct ascending line ; so they likewise are respectively bound to maintain their descendants, when they stand in need. (2)

(1) *C. art. 10 & 19, p. 32 & 34.*

(2) *C. art. 48, p. 54*

LAW 5.

Who are and who are not the children that fathers are bound to maintain.

Men sometimes beget children with their legitimate wives, and sometimes with women who are not their wives. With respect to the rearing up these children, a distinction must be made : for both the relations of the father, in a direct line, as well as those of the mother, are bound to maintain children who are born of lawful wives. And so it would be with respect to children born of women kept openly, as concubines (*amigas*) in the stead of wives : provided there does not exist between the parties, any impediment to their marriage, either of relationship, or of any religious order. But the relations of the father, in the direct ascending line, are not bound, to maintain children born of other women from an adulterous or incestuous connexion, or in other fornication : unless they should do it, of their own accord, being moved to nourish and compassionate them, as they would other strangers, to prevent them from perishing. But the mother and her relations in the direct ascending line, are bound to maintain (*criar*) such children, if they have the means wherewith to do it. And for this reason, that the mother is always certain, that the child born of her, is her own ; which is not the case as to the father, with respect to children born of such women. (1)

(1) C. art. 60 & 61, p. 56.

LAW 6.

For what causes fathers, unless they choose, are dispensed from maintaining their children, and the children their fathers.

It is a common right appertaining to both fathers and children, that when one of them commit towards the other, any of those faults for which men are called in Latin, *ingrati* ; that is, where one man is ungrateful to another for favors he receives, or had received of him : that in that case, the father is dispensed from maintaining his child, and the child from providing for his father. And so it would be where one of them should accuse the other, and endeavor to find out charges against him for which he would deserve death, or by which he would be dishonoured, or lose his estate. Likewise, when the son possesses wherewith to live ; or has a trade by which he can support himself, by exercising it, in an honest way, the father is not bound to maintain him. Likewise if any one who is bound to maintain his father, dies, instituting a stranger, by will, for his heir, and disinheriting his father for some just cause : such heir will not be bound to support the father of the deceased, unless he should be reduced to very great poverty. (1)

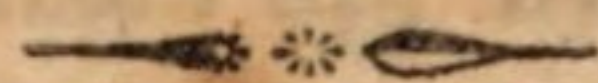
LAW 7.

What ought to be observed when the son demands support from his father who denies that he is his son.

When any one contends that he is the son of another, and requires that the latter should rear him up and maintain him ; it may happen that this latter may deny

(1) C. art. 50, 51, p. 54.

that the other is his son, either to avoid maintaining him, or because he, in truth, is not his son. And therefore, whenever such doubt arises, the judge of the place, ought, in virtue of his office, to inform himself in a summary manner, without delay, and without observing the formalities which are observed in rendering judgments in other causes, whether or not such person is the son of him of whom he says he is. And the judge may obtain such information from the common rumour or report of the people of the place, or by any other means by which he can learn the truth, or by the oath of the person who alledges that he is the son of the other. And if the judge discover from any indications (*algunas señales*), that he is the son, he ought to order the other to nourish and maintain him. (a) Yet notwithstanding the judge give such an order, as is here mentioned, still either party will have the right to prove that such person is or is not the son.



TITLES,

Of the Roman Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on persons whom a man rears up, but who are not his children.

Code lib. 8. tit. 52 — *De infantibus expositis liberis et servis, &c.*

Novel. Coll. 9. tit. 36 — *De infantibus expositis.*

(a) Non ergo statim orta quaestione, debet pronuntiare esse alendum, pendente lite, nisi esset in possessione filiationis, secundum Bart, in *L. Et neget, § de liber, agnose.*

OF THOSE PERSONS WHOM A MAN REARS UP
BUT WHO ARE NOT HIS CHILDREN.

What is meant by rearing up a child and in how
many ways it is done, - - - - - LAW 1

Whence the word (*criado*) reared up, is derived,
and what difference there is between *crianza*
nodrimiento (nourishing), - - - - - 2

What are the duties arising between those who are
reared up and those who rear them, - - - - - 3

Of children exposed at the doors of churches and
in other places, and that their fathers and mas-
ters who exposed them after they are reared up,
cannot claim them, &c. - - - - - 4

TITLE XX.

*Of those persons whom a man rears up about his
house, but who are not his children. (1)*

LAW 1.

*What is meant by rearing up a child and in how many ways
it is done.*

We have explained in the second law of the title
preceding this, what is meant by *crianza* (rearing up)
this term has two acceptations. The first means to
create a thing that does not exist: this power belongs
to God alone. The second, means to create one thing
out of another; this a man can do, through the wisdom
and power he has derived from God. And men may

(1) R. See the laws of the tit. 20. b. 6, Recop.

be prompted to do this last, for one of three reasons. The first, from a natural debt: as that which the father does for his children, of which we spoke in the title preceding this. The second, from goodness and humanity, as where a man rears up *cria* the child of a stranger who is not his relation. The third, through piety; as where a man rears up a child that has been exposed or abandoned.

LAW 2.

Whence the word criado, (reared up,) is derived; and what difference there is between criação and nodrimento (nourishing).

Criado comes from the Latin word, *creare*; which means to rear up and conduct a thing that is small, until it arrives at a condition to take care of itself. And according to what is said by the ancient sages, there is a distinction between *nodrimento* and *criação*. For *criação*, is where one bestows cares upon another whom he rears up, by furnishing him out of his estate, with all that is necessary for him, to live upon; and by keeping him in his house and family. And *nodrimento* means the education and instruction given by preceptors to children whom they have under their care; and by masters to their scholars, whom they instruct in any science or trade, and inspire with good morals, and chastise when they err. And on account of such instruction, it is usual for those who are instructed to administer to their preceptor and masters, and give them what they stand in need of; as also do the great lords and other persons, who furnish them

according to their means, or according to the custom of the country.

LAW 3.

What are the duties arising between those who are reared up, and those who rear them.

It may be that a person who had reared up a child, abandoned by his father, or mother, or his master, or any other person whatever, may, after having rendered such kindness, wish to keep the child under his power, and derive services from the use of his person, as from one in slavery : or he may demand the expenses he had incurred, in rearing up the child. We say that this cannot be done. For he who rears up any one, does not retain any right over his property, or right of service over his person. But if any one should rear up another, and at the time he began to rear him, he had declared in the presence of witnesses (*faze afrentas,*) and said that he intended to recover back the expenses he had incurred, on account of the person reared up ; he may then demand them of such person, who will be bound to reimburse them, if it is in his power. But the person so reared up, cannot be compelled to do any thing else, unless it is to honor him who has reared him up, on all occasions, and respect him in the same manner, as if he were his father : nor can he accuse him, or do to him any other thing, by which he may lose his life, or limb, or estate, or become infamous. And if he act otherwise, and accuse the person who reared him, or do to him any thing else by which he loses his life, or limb, or the greater part of his estate, or becomes infamous; then the person so reared, ought

to suffer death therefor: unless the accusation be brought upon some matter that interested the person of the king, and be made with a view to avert the danger that threatened the king or kingdom.

LAW 4.

Of children exposed at the doors of churches and in other places: and that their fathers and masters who exposed them, cannot reclaim them after they are reared up.

Shame, cruelty, or wickedness, sometimes prompts fathers or mothers to abandon their children, when they are small, by exposing them at the doors of churches, hospitals, or other places: and then, charitable persons who find them, are moved by pity, and take them away and rear them up, or cause it to be done by others. Wherefore we say, that if the father or mother who has thus exposed their child, should wish to reclaim it and take it under their power, they cannot do so. For in such case, they will lose the power they had over their child, unless some other person had exposed it, without their order, or knowledge. For if they reclaim it, as soon as they are informed of the fact, we say that the child ought to be restored to them, on the father and mother reimbursing, if so required, all the expenses incurred by those who reared it up. But if they who had reared the child, had been prompted to do it, through the love of God, without the intention of receiving any other reward; then the father and mother will not be bound to return the expenses which had been incurred on that account. And if peradventure the master should wish to reclaim the slave whom he had thus exposed, he can not; for the slave became

free by the act of exposing it. Likewise by such exposing the master loses the right which he had over the person whom he had freed, so that he cannot afterwards put up any claim to him.

TITLES,

Of the Roman Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on slaves.

Digest lib. 1, tit. 5, l. 3—ibid

l. 4, § 1, 2, 3—ibid l. 5, § 1, --- *De statu hominum.*

Digest lib. 50, tit. 16, l. 239,

§ 1, --- *De verborum significatione.*

Digest lib. 1, tit. 6, l. 1, § 1

and 2, and l. 2, --- *De his qui sui vel alieni juris sunt.*

Institutes lib. 1, tit. 3, --- *De jure personarum.*

Institutes lib. 1, tit. 8, --- *De his qui sui vel alieni juris sunt.*

Institutes lib. 2, tit. 9, § 3, --- *Per quas personas cuique adquiritur.*

Code lib. 4, tit. 27, --- *Per quas personas nobis adquiritur.*

Code lib. 9, tit. 14, --- *De emendatione servorum.*

Civil Code b. 1, tit. 6, chap. 3.

OF SLAVES.

What is meant by slavery; whence the term is derived, and how many kinds there are, --- LAW 1

Of the condition of those who are born of a mother in slavery and of a free man, --- 2

- That the children of clergymen who are in holy
orders, ought to be the slaves of the church, - LAW 3
- That christians who furnish iron, timber, arms or
ships, to the enemies of the faith, become slaves
on that account, - - - - - 4
- In what things slaves are bound to serve their
masters, - - - - - 5
- What power masters have over their slaves, - - 6
- That the gains made by slaves belong to their
masters, - - - - - 7
- That the Moors and Jews cannot have Christian
slaves, - - - - - 8

TITLE XXI.

Of Slaves.

LAW 1.

What is meant by slavery, whence the term is derived, and how many kinds there are.

Slavery is a condition and state of things established anciently by nations, by which men who were naturally free, are made slaves, and put under the dominion of others, contrary to natural reason. And the term slave (*siervo*) comes from the Latin word, *servare*, which in common speech means to keep or preserve *guardar*. And such keeping or preserving was established by the emperors: for anciently all who were taken captives, were put to death. But the emperors found it best, that they should not be put to death, but preserved, and made use of. And there

are three sorts of slaves. The first, those who are made captives in war, and who are enemies of the faith. The second, those who are born of mothers in slavery. The third, those who are free, and who suffer themselves to be sold. With respect to this last sort, five things are necessary. The first, that the party freely consent, that he should be sold. The second; that he receive a part of the price. The third, that he should know he was free. The fourth, that the buyer should believe him to be a slave. The fifth, that he who causes himself to be sold, should be above twenty years of age. (1) (a)

LAW 2.

Of the condition of those who are born of a mother in slavery, and of a free man.

They who are born of a free man and a mother in slavery, are themselves slaves: for they follow the condition of their mother, as to slavery or emancipation (*franqueça*). But if the mother happen to be pregnant, and she be enfranchised, the child born of her will be free, though she should not carry the child in her womb more than one hour, or less, after she was enfranchised. And though the mother should afterwards return to a state of slavery, the child would nevertheless, remain free, on account of the time whether great or small she had carried it in her womb, af-

(1) *C. art. 13. p. 10.*

(a) Slavery, in this state, is confined to negroes, brought immediately from Africa, or their descendants; with the exception of the descendants of certain Indians who were taken as captives in war, or who were sold as slaves while Louisiana was held by the French. *Seville vs : Chretien, Mart. Rep. vol. 5. p. 275.*

ter she was emancipated. But the children born of a free mother, and a father in a state of slavery, will be free, because they always follow the condition of the mother, as is above said. And notwithstanding we then said that children ought to follow the condition of their mother, yet those who are born of a free father and mother, ought to follow the condition of their father as to his honors and temporal privileges. (1)

LAW 3.

That the children of clergymen, who are in holy orders, ought to be the slaves of the church.

(Not in force)

LAW 4.

That christians who furnish iron, timber, arms, or ships to the enemies of the faith, become slaves on that account.

(Not in force.)

LAW 5.

In what things slaves are bound to save their masters from harm.

Every slave is bound to preserve his master from harm or dishonor, by all the means in his power or knowledge: and he is bound to obey him, and to promote his honors and fortune, in every way he can. And not only is a slave bound in these things towards his master, but likewise towards his wife and his children. And if they should have need of him, in case

(1) C. art. 24, p. 40.

any one should attempt to kill or dishonor them, he ought to die for them, that he may save them from death or dishonor. And every slave is bound to perform this duty well and faithfully, and he can, in no wise, excuse himself therefrom, when it is in his power to do it: unless he should be prevented by infirmity, or imprisonment, or confinement; or because he was too far from the place, so that he could not in any manner, render assistance. And if such slave kill, or wound any one, in preserving his master who is threatened with death, he will not incur any penalty therefor.

LAW 6.

What power masters have over their slaves.

The master has full power over his slave to do with him what he pleases. Nevertheless he can neither kill or wound him, notwithstanding the slave may deserve it, unless he does it under the orders of the judge of the place: nor ought he to strike him in an unnatural and cruel manner, or cause him to perish by hunger: unless he had found him with his wife, or daughter, or had committed some other similar offence; for then he may kill the slave. We likewise say that if a man be so cruel to his slaves, as to cause them to die of hunger, or strike or chastise them so severely with the whip, that they cannot bear it; they may then complain to the judge, who ought, in virtue of his office, to enquire into the truth of the facts, and if he finds them to be so, he ought to sell the slaves, and give the price to their master. And this ought to be

done in such a manner, that the slaves shall never again come under the power or dominion of the person, by whose fault they were sold. (1)

LAW 7.

That the gains made by slaves belong to their masters.

Every thing acquired by a slave in whatever manner it may be, will belong to his master. And we also say, that the master may claim every thing which had been bequeathed by will, to his slave, in the same manner, as if it had been bequeathed to himself. We likewise say that if one put his slave in a shop, or vessel, or any other place, commanding him to exercise any trade or commerce; then every contract made by the slave with any other person, in the way of such trade, or commerce in which he is employed, must be observed and executed by the master, in the same manner as if he had contracted them himself. (2)

LAW 8.

That Moors and Jews can not have christian slaves.

(Not in force.)

(1) C. art. 27. p. 42.

(2) C. art 17. p. 40.

TITLES,

Of the Roman and Spanish Laws and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on li-
berty.

Digest lib. 40, tit. 1, - - - - *De manumissionibus.* (a)

Institutes lib. 1, tit. 5, - - - - *De libertinis.*

Institutes lib. 1, tit. 6, - - - - *Quibus ex causis manumit-
tere non licet.*

Code lib. 7, tit. 1, - - - - - *De vindicta libertate et apud
consilium manumissione.*

Code lib. 7, tit. 2, - - - - - *De testamentaria manumis-
sione.* (b)

Fuero juzgo, b. 5, tit. 7.

Civil Code book 1, tit. 7, chap. 3, ll. 25, 26, 27, p. 40 & 42.

Act of the legislature passed on the 9th March, 1807.

OF LIBERTY.

What is meant by liberty ; who can confer it ; on
whom, and in what manner, - - - - - LAW 1

That a slave may be enfranchised when he be-
longs to two masters ; one of whom is willing
to set him free, while the other is not, - - - - 2

In what cases a slave may become free on account
of some good action, although his master should
not consent to it, - - - - - 3

That a female slave will become free when her
master puts her in a brothel that he may profit
by her, - - - - - 4

(a) See book *idem*, tit. 2, 3, 4, and book 38, tit. 1, 2, 3, 5.

(b) See book 7—*ibid* tit. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13,
14, 15, 16, 17—*ibid* tit. 18---*ibid* book 6, tit. 1, 3, 4, 5, 6, 7---*ibid*
7, tit. 10---*ibid* book 10, tit. 56.

That the slave becomes free by the effect of marriage, - - - - -	LAW 5
That a slave is enfranchised by becoming a clergyman, or receiving holy orders, - - - - -	6
In what manner a slave may acquire his freedom by prescription, - - - - -	7
That the enfranchised slave ought to honour him who enfranchised him, and his wife and children, and in what things he ought to reverence him, - - - - -	8
For what causes the master may reduce again to slavery, a person whom he had enfranchised, -	9
What rights masters have over the estates of those whom they have enfranchised, - - - - -	10
For what causes the master may lose the right he has to the estate of his freed man, - - - - -	11



TITLE XXII.

Of Liberty.

LAW 2.

What is meant by liberty ; who can confer it ; on whom, and in what manner.

Liberty is the power which every man naturally has, of doing what he pleases, unless prevented by force, by law, or custom (*fuero.*) And the master may give liberty to his slave, in, or out of church ; before the judge, or elsewhere ; by will, or without it, or by writing (*carta.*) But this he must do in person, and not by attorney ; unless he orders some of his de-

scendants or ascendants in the direct line, to do it for him. And when he enfranchises the slave by writing (*carta*) or before his friends, it must be done before five witnesses. (a) And if he wish to enfranchise him by will, he cannot do it unless he be fourteen years of age. Or if he desire to enfranchise him in any other way by writing, or before witnesses, or friends, he can not do it, except he be twenty years of age ; unless the person enfranchised be his son, or daughter, whom he had by his female slave ; or were his father or mother, or brother or sister ; or his preceptor who had instructed him ; or his nurse who had reared him up ; or a person who had been reared up by him ; or the child of his nurse who had been suckled with him ; or were a slave who had saved him from death or infamy ; or one whom he wished to enfranchise in order to constitute him his attorney in fact, to transact his business, out of court, provided the slave be at least seventeen years of age complete ; or were a female slave whom he enfranchised in order to marry her. But in this last case, he must take an oath that he enfranchises her for that purpose, and that he will marry her within six months. For, on proving any of the above mentioned facts before the judge, the master, who is a minor under twenty years of age, and over seventeen, may enfranchise his slave ; provided he act always under the consent of his guardian. (1)

(a) See Bazy vs : Rose and Child. Mart. Rep. vol, 8, p. 149.

(1) C. art. 25, p. 40—see the act of the legislature passed on the 6th March 1807, prescribing the conditions and forms of emancipating of slaves.

LAW 2.

That a slave may be enfranchised when he belongs to two masters, one of whom is willing to set him free, while the other is not.

When a slave belongs to two or more masters, and one of them wishes to enfranchise him, he may do it. And if the one willing to enfranchise him, or any other person, desire to purchase the rights of the other co-proprietors to the slave, the latter will be bound to sell such rights, for a just and reasonable price, though they should be unwilling to do so, accordingly as the judge of the place, where the dispute arises, shall think proper. And if they be contumacious and refuse to sell, or to take the price as commanded by the judge; then the judge ought to cause the price to be deposited for them, in the church, or some other determinate place; after which the slave will be free, notwithstanding his masters should not consent to it. (a)

LAW 3.

In what cases a slave may become free, on account of some good action, although his masters should not consent to it.

Slaves sometimes deserve to be enfranchised, on account of good actions they had performed, notwithstanding their masters should not consent to do it. And this may happen in four ways. The first is, when the slave denounces to the king, or some person who

(a) Whether this law be still in force or not, will depend upon the construction which may be given to art. 27, Civ. Code, b. 24

administers justice in his name, any one who had forced, or carried away a virgin against her will. The second, when he detects a man who had made false money. The third, when he detects any one appointed to the command of cavalry, or other troops who had been, by order of the king, placed on the frontiers, or in any other place, and who had deserted their post, without the king's permission. And so it would be if he detected any soldier who had deserted from the king, or his officer, in such place. The fourth is, when he accuses any one who had killed his master; or when he avenges the death of his master, or detects any treason meditated against the king or kingdom. But in the three first cases, the king or other lord before whom the detection is made, ought to pay the master of the slave, the price he may be worth. (1)

LAW 4.

That a female slave may become free, when her master puts her in a brothel, that he may profit by her.

[Not in force.]

LAW 5.

That a slave becomes free by the effect of marriage.

[Not in force.]

LAW 6.

That a slave is enfranchised by becoming a clergyman, or receiving holy orders.

(Not in force.)

(1) C. art, 27, p. 42.

LAW 7.

In what manner a slave may acquire his freedom by prescription.

If a slave enjoy his freedom, during ten years, in good faith, believing he was free, in the country where his master lives ; or during twenty years, in any other country, although his master should not see him, he becomes thereby free. But if he had not acted in good faith, knowing that he was a slave ; he would not then become free, though he may have fled during twenty years ; and his master may, on the contrary, if he finds him, reduce him again to a state of slavery. But if he had fled and remained away during thirty years, he will from that time, become free : and he who had before been his master will have no right whatever over him. And this is understood where the slave has fled to a christian country. But if he had gone to a country of Moors, he would be free, whatever may be the time he remained there ; in the same manner as where a christian who had been a captive among the Moors, escapes and returns to a christian country.

LAW 8.

That the enfranchised slave ought to honor him who enfranchised him, and his wife and children ; and in what things he ought to reverence him.

As liberty is one of the most honorable and precious things of this world, they therefore who receive it, are the more obliged to obey, and love, and honor their masters who enfranchise them, And although

men are bound to acknowledge a benefit and to feel grateful towards those from whom they receive it, yet the obligation extends no farther. For as slavery is the basest and most despicable thing on earth, (except sin,) so liberty is the most dear and precious. And therefore the freed man and his children, are bound to honor and reverence, in every respect, his master, from whom he received his liberty, as well as his children; but he would not be bound to reverence other strangers whom his master instituted his heirs by will. And the manner in which freed men are bound to honor their master, is that they ought to salute him and his children in an humble manner, every time they appear in his presence: and whenever the freed man should be sitting, he ought to rise when his master approaches, and receive him, and testify his respect and honor him, in every other way in his power. And he ought not to sue his ancient master, or make any demand against him, unless with the permission of the judge; nor ought he to accuse or defame him, in any manner; unless in matters which affect the kingdom or person of the king, or unless his ancient master had done him some great personal injury, by striking him with arms, or by inflicting upon him, some other inexcusable wrong. And even then he can not complain against his former master, for such a cause, without permission of the judge, as is above said. But if the freed man be the guardian of an orphan, he may bring suit against his former master, concerning any thing belonging to the orphan. And in all other things, the freed man ought to honor

and assist the person who set him free. For if he sees, or knows that any thing belonging to the former master, is in a bad condition, or is exposed to be lost; he ought to endeavour to take the best care of it he can, so that it be neither lost or deteriorated, in the same manner, as if the thing belonged to himself. And this he ought to do, when the master was not present. And he ought to perform still another duty; for if he is informed that his ancient master has become so poor that he had need of his assistance; he ought to come to his aid, and give him wherewith to eat, drink, to cloath and shoe himself with, according to his means and the best of his ability.

LAW 9.

For what causes the master may reduce again to slavery, a person whom he had enfranchised.

There are masters who enfranchise their slaves, through pure good will, desiring to render them a benefit and favour, without taking any reward whatever from them. There are others who enfranchise their slaves for a price which they receive; or because their master has ordered them by his will to be enfranchised by the person therein instituted as heir. We therefore say, that if the master enfranchise his slave through mere good will, without taking any price therefor; or if he receives a price from the slave which the latter gives for himself; and such freed man afterwards commit some offence against his master, or his children: as if he accuse or defame them; or league with their enemies to their prejudice: or if he be unwilling to furnish them with food or clothing when they are in

need, according to what is said in the law preceding this: or if he be ungrateful to them, in any of the ways for which a man who gives something to another, may take it back again, as is said in the title on donations, in the fifth partida of this book; then we say, that the master may, on that account, reduce him again to slavery, by complaining against him, and proving any of these things in court. But if the price which the master had received for enfranchising him, had not been given by the freedman himself, but by some other person for him: or if he had enfranchised him by the command of another person who was his master: then we say, that although the freedman should commit any of the offences above mentioned, yet he who had enfranchised him, can not reduce him to slavery again. But he may complain to the judge of the place, who ought to chastise the freed man, and inflict upon him such penalty as the offence he had committed deserves. (a)

LAW 10.

What rights masters have over the estates of those whom they have enfranchised.

We have explained what right remained to the master over the person of one whom he had enfranchised. We will now explain what right he has over his property. And we say that if the freed man die *intestate*, leaving neither child or grand-child to inherit his estate; nor father, or brothers or sisters, who

(a) We have translated this law, notwithstanding it appears to us that some of its provisions were not in force,

are free, then all his property will belong to his master. And if he made a will, without leaving any of the above mentioned relations; and his estate be worth one hundred maravedis of gold, or more, (a) he ought to leave to his former master, one third of all he possessed. But if his estate be under the value of that sum, he will not be bound to leave any thing to his master, if he should not choose to do so. And if he die intestate, leaving any of the above relations; then whatever may be the value of his estate; his master will have no right whatever, to any part of it; but it will belong to the children of the freed man, or the nearest relation he left, of those above mentioned.

LAW 11.

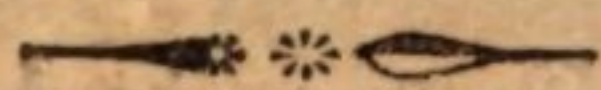
For what causes the master may lose the right he has to the estate of his freedman.

The master, who enfranchises his slave that he may return anew to the state of man, is called in Latin *patronus*. And the right which the master has upon the estate of his freedman, may be lost in many ways. The first is where the freed man suffers from hunger, and his ancient master does not assist him by giving

(a) At the date of the publication of the Partidas the gold and silver *maravedis* were a sort of coin in use in Spain. The value of the silver *maravedis* is unknown. That of the gold *maravedis* has been fixed after much research, by Gregorio Lopez and Febrero and particularly by the latter, at the fiftieth part of a mark of gold of eight ounces. So that 500 gold *maravedis* were worth 25,600 reals of the present money of Spain, and therefore the hundred gold *maravedis* mentioned in this law are equal to 5,120 reals, which at 20 reals to the dollar makes 256 dollars—Febrero part 1. chap. 5. 3. 1. no. 11.

him wherewith to eat, when he has it in his power. The second, is where the former master, compells the freedman to take an oath, that he will not marry, nor beget children. The third is where the freed man was enfranchised, on account of his merits and the good that he had done; as where he has avenged the death of his master. The fourth, is where the freed man has received his liberty from the emperor or king in these words "I command that you be free, in the same manner, as if you had never been a slave." The fifth, is where the former master is banished forever. The sixth, is where the master receives something of the freed man, in lieu of the part he had a right to take out of his estate, after his death; or where the master considers himself as paid therefor, though he had never received any thing. The seventh, is where the patron enfranchises the slave and makes him promise, or oblige himself to perform certain work for him, after he is enfranchised. For, in whatever manner the patron may receive from the freed man, that which the latter had promised him, or had obligated himself to do, either by his doing it, or by paying a price in its stead; he will thereby lose the part he was to have out of the estate of the freed man, unless he had received such price to nourish himself, when he was greatly oppressed by hunger. We likewise say that if the patron releases to the freed man, all the rights he had over him, that this is the eighth way in which the former will lose the right to inherit of the estate of the latter. But in whatever way this right may be lost, yet if the freed man commit any of the crimes mentioned in the ninth law of this title, he may be reduced to slavery again.

And in all the ways which we have mentioned in this law, by which the patron loses his right to inherit the estate of his freed man; so by the same means, will his children and all his other descendants, as far as the fourth degree, lose the same right. And we likewise say, that if the children of the master, who are twenty-five years of age, bring against the freed man, an accusation for which he might lose his life, or suffer banishment: or if they commence a suit, in order to reduce him again to slavery, and follow it up until judgment be rendered in that respect; they will thereby lose the right they had to inherit the estate of the freed man. And so it would be if they order another person to bring the accusation for them; or if they give testimony against him in any such suit.



TITLES,

Of the Roman Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on the state of man.

Digest lib. 1, tit. 5. - - - - - *De statu hominum.*

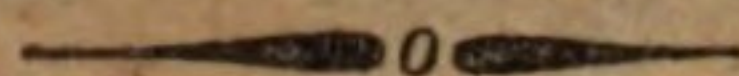
Domat's Civil Law, preliminary book, tit. 2.

Civil Code, book 1st, tit. 1st.

OF THE STATE OF MAN.

What is meant by the state of man; how many kinds there are; and the advantage of knowing the same, - - - - - LAW 1
Of the effect of the different conditions of men, 2

In what state and condition is the child which is in the womb of his mother, - - - - -	LAW 3
How long a time can a pregnant woman carry the child in her womb according to law and na- ture, - - - - -	4
Of a child born without having the human form,	5



TITLE XXIII.

Of the state of man.

LAW 1.

What is meant by the state (estado) of man ; how many kinds there are ; and the advantages of knowing the same.

Status hominum, means in common speech, the state, or condition, or manner in which men live, and exist. And there are as many varieties of such states, or conditions, as we have above mentioned in the prologue to this title. (a) And a very great advantage is derived from knowing and understanding the state of men ; for then one can more easily distinguish and determine what takes place, in relation to their persons.

LAW 2.

Of the effect of the different conditions of men.

The different conditions of men, produces many different effects ; For by law, a freeman is judged dif-

(a) Which is freemen and slaves, those who have been enfranchised, those already born and those who are still in the womb.

ferently from a slave ; though, by nature, there exists no difference between them. And so noblemen (*fijos dalgos*) are honoured and judged in a manner different from others of lower grade : and the clergy differently from the laity ; legitimate children, differently from those that are illegitimate ; and christians, differently from Moors and Jews. Likewise men are in a better condition than women, in many things, and in many ways, as will be fully shewn in the laws of the titles of this our book, which treat of the above matter. (1)

LAW 3.

In what state and condition is the child, while it is in the womb of its mother.

While the child is in the womb of its mother, every thing that is done or said to its advantage, profits it, in the same manner as if it were born : but whatever is said or done to the injury of its person or property, will not prejudice it. And therefore if the master of any female slave that is pregnant, order his heir, or give any other person, the power, to enfranchise such slave, at a certain time : and the heir, or such other person, does not enfranchise her by the time they were commanded to do it, but delay it, maliciously, that the child may be born a slave : in that case, the ancient sages who made the laws, have declared, that from the day fixed for the enfranchisement, both the mother and the child born of her, will be free. And they likewise

(1) *C. art. 1, 13, 14, 15, p. 8 & 10.*

declared, that if any pregnant woman should commit an offence, for which she was condemned to death; that the child which might be born of her, would be exempt from that penalty. Wherefore they ought to preserve and take care of the mother until she be delivered, as is said in the seventh partida, under the title of penalties. (1)

LAW 4.

How long a time can a pregnant woman carry the child in her womb, according to law and nature.

Hypocrates was a philosopher in the science of physic, who said that the greatest length of time a woman can carry a child in her womb, is ten months. And therefore, if the wife bring forth, within (*fasta*) ten months, from the day of the death of her husband, the child born of her, will be legitimate, and will be considered as the offspring of her husband, notwithstanding it be born in that time; provided that she lived with him, at the time he died. That philosopher also said, that a child born after (*fasta*) seven months, provided its birth was one day only after the seventh month began, and it be perfect and capable of living, ought to be considered as the legitimate offspring of the father and mother who were married and lived together, at the time of its conception. And the same thing must be observed with respect to a child born within nine months, (*fasta en los nueve meses*) which is the most usual time of gestation. But if the child be born, as remote as the first day of the eleventh month, after the

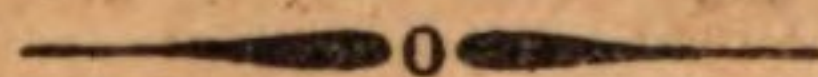
(1) C. art. 7, p. 8.

death of its father, it ought not to be considered as his child. And as to the manner in which women, who say they are left pregnant by their deceased husbands, ought to be taken care of, in order that no error may be committed as to the children born of them, we will explain in the seventh *Partida* of this book, in the laws which speak of that matter. (1)

LAW 5.

Of a child born without the human form.

They ought not to be reckoned among children, who are not born with the human form ; as if they have the head or other members of a beast. And therefore, their fathers and mothers will not be bound to make them their heirs ; and though they should be instituted heirs, they ought not to inherit. But if the child be born with a human figure, notwithstanding it may have too great or small a number of limbs, yet that will not prevent it from inheriting the estate of its father or mother, or of its other relations.



TITLE XXIV.

Of the duties which men owe to their lords on account of their nativity, (naturaleza.)

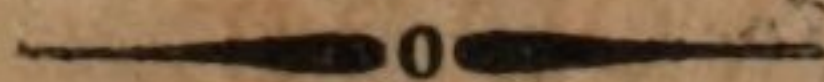
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(1) C. art. 8, 9 & 10, p. 44.

TITLE XXV.

Of Vassals.

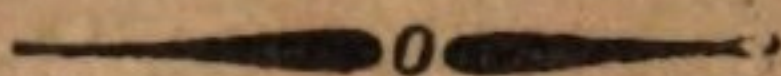
(Not in force)



TITLE XXVI.

Of Fiefs, (Feudos.)

(Not in force.)



TITLE XXVII.

*Of the duties which men owe one another, on account
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(Not in force.)

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END OF THE FOURTH PARTIDA AND OF THE FIRST
VOLUME.

Louisiana
Partidas

Moreau Lislet, Louis

The laws of las siete Partidas which are still in force in the state of
Lousiana

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